00079099

BOMBAY BRANCH
OF THE
Royal Asiatic Society.
CLASS

Digitized with financial assistance from
Mr.Aneesh Vasant Pradhan
on 21 February, 2019

RULES OF EVIDENCE

ON

Pleas of the Crown.

THE

RULES OF EVIDENCE

ON

Pleas of the Crown,

ILLUSTRATED FROM

PRINTED AND MANUSCRIPT

TRIALS AND CASES.

79099
ae

BY *LEONARD MAC NALLY*, ESQ.
BARRISTER AT LAW.

RULES OF EVIDENCE ARE OF VAST IMPORTANCE TO ALL ORDERS AND DEGREES OF MEN; OUR LIVES, OUR LIBERTY, AND OUR PROPERTY ARE CONCERNED IN THE SUPPORT OF THEM.

LORD KENYON.

PRINTED
FOR J. BUTTERWORTH, LONDON,
AND
J. COOKE, DUBLIN,
By H. Fitzpatrick, Capel-Street, Dublin.
1802.

God
345.42014
Nat / Rul
79099

TO

JOHN PHILPOT CURRAN, ESQ.

ONE OF HIS MAJESTY'S COUNSEL AT LAW.

THIS WORK IS INSCRIBED,

FROM an affectionate attachment, and from a proud wiſh to make known to poſterity, that a reciprocal and an uninterrupted amity ſubſiſted between the AUTHOR and the MAN, whoſe tranſcendent genius and philoſophic mind ſoars above all competition—

WHOSE honeſt, and intrepid heart was never influenced in the SENATE, nor intimidated at the BAR, from exerting, with zeal, independence, and ſpirit, his love to his country and his duty to his client.

LEONARD MAC NALLY.

Dublin, Harcourt-Street,
Auguſt 4, 1802.

☞ The ſtricteſt attention has been paid to preſerve the language of the lawyers and judges, whoſe arguments and deciſions are reported in this work: but there are many literal errors, which a laborious and ſedulous attention to profeſſional buſineſs in the courts, and an abſence on circuit muſt excuſe. However, with all its imperfections, it is hoped, that the work will be found uſeful, from the information it contains, particularly at the aſſizes, where the practitioner has neither time nor opportunity to make reſearches into the numerous and voluminous reports of trials and caſes, from which the rules and illuſtrations herein formed and arranged, have been extracted.

CASES CITED.

A.

Abrahams v. Bunn, 1, 16, 37, 60, 108, 115, 129, 130, 138, 146
Annesley v. Earl of Anglesea, 14, 181, 240, 257
Anstruther's case 36
Alsop v. Bowkele 87
Atchenson v. Everat 94, 97, 100
Audley, lord 99, 161, 172, 192
Azir 174
Atwood 196
Adams 262
Abington 294
Ansell 344
Aickles 350, 477, 590
Ashton 366
Albeny v. Wallace 513
Appletree 527
Almon 642

B.

Bell 43
Butcher 48
Bent v. Baker 89, 126, 128, 137
Beak v. Tyrrel 92
Bray 111, 129, 136
Broughton 112
Bartlett v. Pickersgill 112
Blackman 116
Barlow v. Vowell 132
Bailey v. Wilson 130
Brazier 153
Bartlett 156
Broughton v. Harpur 171
Bentley v. Cook 171
Bowes 173
Brodie 182
Bush v. Ralling 182
Burroughs v. Holcroft 224
Berwick 271
Buckworth 283
Benson v. Olive 287
Brown 320
Brecknock 322, 324
Bond 5, 324, 381
Byrne 324, 381
Brocas v. mayor of London 357
Bishops, the seven 397
Broadhead v. Woodley 417
Boyle v. Boyle 443
Brady 471
Benyman v. Wise 487
Brothwicke 539
Banson v. Offley 541
Baylis 656

C.

Chetwynd v. Wyndham 1
College 10, 11
Connor 35
Carty and others 45
Colt v. Dutton 96
Castele v. Bambridge 102
Carter v. Pearce 122, 130
Crowder 146, 197
Cliviger parish 163
Crosby 195, 211, 232, 402
Clarke v. Shee and Johnson 204
Crosley 209
Castlemain 227, 228, 234
Cuddenston v. Wilkins 234
Crofts v. Bickering 242, 243
Cobden v. Kendrick 245
Church v. Perkins 265
Carr 321, 407
Crawley 322, 577
Cornelius 347, 433
Cornish 366, 376
Cook 367
Crohagan 373
Callaghan 385
Crew v. Saunders 485
Charnock 498
Clarke 503
Coal-heavers 525
Charlewood 592
Coslet 593

Cornwall 604
Clarke 646
Combe v. Pitt 654

D.

Dutton v. Colt 83
Dylone 61
Dockery v. Dickenſon 89
Dodd 142, 201
Durham 146, 197
Donell 147
David v. Dinwoody 170
Davis v. Carter 211, 212
Doe dim. Jupp. v. Andrews 244
Dunn and Carty 259, 264
Dingler 174, 299, 385
Damaree and Purchaſe 367, 376
Drummond 387
De Lamotte 408
Denniſon v. Wilmot 471
Durore 501
Deacon 505
Drake 512
Donnelly 598

E.

Eſſex, earl of 40, 294
Eaſt-India Company v. Goſling 112
Ellis 112
Evans v. Gold 114
Eden 116
Edwards 258
Eriſwell 300
Eaſt-India company 356
Entic v. Carrington 644

F.

Finny 4
Fitzharris 12
Fenwick's, ſir John, caſe 17, 29, 316, 390
Fiſher 50
Fagan 51
Frazer 56
Fitzpatrick 97
French v. Backhouſe 126
French v. Foulſton 126
Fox v. Luſhington 138
Fotheringham v. Greenwood 140
Fox 145
Fulwood 180
Ford 209
Friend 257, 367, 368, 376
Francia 273, 404, 508
Finnerty 295
Finny 324, 379
Fitzharris 369
Farmer v. Ather 433
Farr 439
Furſman v. Furſman 444
Fitzgerald 475
Fuller 649

G.

Gahagan, and others 35
Gordon, lord George 61
Gardner 103
Green 104
Goodtitle and Fowler v. Welford 117, 130, 136
Gordon 147, 356, 364, 373, 375
Griggs 161, 181
Ganſell 211
Grieppe 235
Gregg 273
Gray 328
Gwyn 359
Gardell 434
Gordon, Thos. and Win. 488
Gore 555
Grey 557
Gribbe 600
Gibbons 683

H.

Hardy 7, 362, 611
Hall 40, 51
Hinxman 50
Hampden 59
Hopkin v. Neal 60
Holcroft 221
Hill 228
Harris 320
Hart 324, 516
Haſtings 325
Hoe v. Nelthorpe 355
Hampden 361

Huny 389
Henſey 407, 424, 503
Hutchinſon 428
Hare 471
Hoet 479
Hawkſwood 480
Huſſey v. Cook 519
Hodgſon 538
Harris and Minion 544
Hull 558
Holloway 565
Horner 591
Hughes 603
Harris 642
Hart 650
Hall 650

J.

Jackſon 20, 25, 30, 258, 324, 416, 424
Jacobs 49
James 163, 635
Jordain v. Laſhbroke 124, 198
Jones v. Randall 357

K.

King v. Tilly 60
Kerr 147
Kelly 154
Kingſton, dutcheſs of 247, 430
Keogh 320
Kennedy 324
King v. Smith 357
Krell 647

L.

Low's, Chriſtopher, caſe 23
Lumley's, lord, caſe 25
Lamb 38
Layer 39, 147, 200, 353, 506
Lockhart 48
Leary 61, 324, 379
Lopez v. Nunez 72
Long 110
Low v. Joliff 135
Langhorn 139
Lovat 145
Lomax v. Lomax 182
Love 191, 337
Luckhurſt 203
Lee v. Ganſell 211
Langhorn's caſe 291
Lowfield v. Stoneham 345
Le Merchant 350
Lynch v. Clarke 355
Lutteral, Lucy, v. Reynell 378
Lee 481, 635
Lowick 506
Lapier 593
Le Motte 602

M.

Maphan 35
Muſcot's caſe 37
Magill 38
Mozey 48
Mac Donald 49
Moiſe 105, 144
Magarry 107
Maſters v. Drayton 114
Mackartney 144
Murphy 154, 231
Meers v. lord Stourton 159
M'Donald v. Ramſay 230
Millar 263
Montague 270
Morley, lord 285, 307
Mockler 320
M'Cann 324
Man v. Cary 356
Minton 386
Macpherſon v. Thoytes 418
Milleſent v. Milleſent 441
M'Daniel 464
Morris 470
Motherſell 479
Matthews 495
Meſſenger 527
Mawgridge 549, 565
Mackally 552
Murray 587
Martin 593
Munoz 641

N.

Nunez 105, 106, 111
Newens 106
Newland 117
Norfolk, duke of 156, 190
Nicholſon v. Dalyhunty 212
Netterville, lord 287, 214
Nailor 563
Nutt 642
Norton 653

O.

Omychund v. Barker 64, 151, 156
Owens 102
Oakhampton, mayor of 182
O'Brien 253
Oates 256
Ogle 513
Oneby 547

P.

Peachum 7
Paine 14, 39, 52
Paris 105, 111, 283
Parr 143
Powell 151
Preſton, lord 160
Perry 181
Penchell v. Pendrell 182
Price 195
Philips v. Fowler 205
Pendock v. Mackender 207
Palmer 218
Preſton 403, 424, 503
Perry 441
Pitton v. Walter 479
Penhalloe 494
Page 494
Plummer 537, 554
Phillips 567
Pears 590
Patch 591
Parſons 632
Plympton 652

R.

Raleigh, ſir Walter 7, 40, 294
Roſe 56
Robeely v. Langſton 67
Ryan 95
Robins v. Seyward 103
Redout v. Johnſon 126, 131, 135
Rotheroe and others, v. Elton 137
Rookwood's caſe 14, 140, 226, 324
Rudd 141, 176, 185
Ruſſell 142, 365
Rhodes 142, 434, 476
Regicides 193
Reilly 232
Reading 256
Radbourne 289
Ravenſtone 313
Roe, on dim. Haldane 346
Roſewell 365, 373, 376
Reaſon and Tranter 381, 566
Revet v. Braham 418
Roache 428
Richardſon 450
Ramſbottom 477
Recuſit 482
Radford v. M'Intoſh 486
Royce 524
Rampton 558
Rowley 567
Rock 594

S.

Stafford's, lord 20, 27, 290, 611
Stubbs 39, 193
Stone 40, 611
Selſhire 49
Smith 110, 462
Salmon v. Saxby 115
Sutton v. Shelly 123
Smith v. Prager 137
Sewell 144
Searle v. Williams 221
Say and Seal 240
Shaftſbury, earl of 256
Shears 324, 381, 416
Sidney 395
Stranger v. Searle 418
Sanchar's caſe 466
Shelly 487
Syer 497

Saunders 555
Stedman 565
Sears 587
Sharpleſs and Greatrix 590
Shee 641
Strahan 646
Salmon 649
Scott 657

T.

Throgmorton's caſe 6, 25, 40
Turner 10
Thomas 25, 294
Thong 39, 193, 200, 268
Tremoult v. Dedire 89
Turner 101
Travers 152
Tracy 162
Trew 195
Taylor 261, 489
Tanner v. Taylor 267
Tooker v. duke of Bedford 307
Thelwell 324
Turner 335
Trant 385
Tandy 409
Townly 498
Turville v. Aynſworth 518
Tomſon 561
Tooley 572
Taylor, Sarah 685

U. & V.

Vaughan's caſe 35, 42, 507, 652
Vaillant v. Dodermead 246
Uddal 294
Vane 325, 395, 497, 503, 504
Vincent 434, 452
Varley 546

W.

Windham v. Chetwynd 1, 16
Warrickſhall 47
Wheeler 51
Wells and Williams 84, 143
Whyte 96
Wyche 103
Whiting 105, 106, 111, 142
Watts 111
Woolridge 120
Walton v. Shelly 123, 131, 132, 133, 143
Walker v. Kearny 212
Warwick 24, 218. 229, 230
Watkinſon 240
Wilſon v. Raſtell 250
Weldon 259
Willis 270, 358
Weſtbeer 288
Woodcock 296, 383
Welſh 315
Weldon 324
Watſon 342
Wariner v. Jones 358
Wright v. Littler 386
Withwell v. Dimſdale 484
Winwiche 489
White 502
Woodward ibid
Whitaker 516
Wilde 517
Weſton 521
Wallis 540
Wilſon 545
Wynne 587
Wilkins 591
Woodfall 649
Williams ibid

Y.

Young 45

THE

RULES OF EVIDENCE

ON

Pleas of the Crown.

BOOK I.

CHAPTER I.

Evidence by witneſſes defined. The effect it ſhould have on a jury when attended with impeachment of the witneſſes or other circumſtances which creates doubt in their minds, they being the conſtitutional and only judges of the facts given in evidence, and alſo of the credit due to the witneſſes.

WITNESS, *(teſtis)* is one that gives evidence in a cauſe; an indifferent perſon to each party, ſworn to ſpeak the truth, the whole truth, and nothing but the truth: and if he will be a gainer or loſer by the ſuit, he is then incompetent and cannot be ſworn as a witneſs; for the term witneſs includes *competence*, though it does not include *credit*. 1 *Lill. Abrid.* 700. *Vide Windham, v. Chetwynd, poſt.* and *Abrahams, quitam v. Bunn. Poſt.* 3 *Blackſt. Comm.* 369.

EVIDENCE, *(evidentia)* Parol evidence, in legal parlance, is uſed for proof, by teſtimony of a witneſs, or

witneſſes, examined on an oath or a ſolemn obligation, by an appeal to GOD adminiſtered to the witneſs, according to the cuſtom and ceremonies of his religion. *Jacob. La. Dic. vide poſt. ca.*

There is alſo written evidence by records, writings, &c. *Vide poſt. ca.*

It is called *evidence*, becauſe it demonſtrates, makes clear, and aſcertains to the jury, the truth of the very fact or point in iſſue to be tried, either on the one ſide or the other: and from this reſults—

Rule the Firſt.

No evidence ought to be admitted to any point but that on which the iſſue is joined: for *probationes debent eſſe evidentes et perſpicua.* Co. Litt. 283. Lill. Abr. 547 3 Black. Comm. 367.

Rule the Second.

It may alſo at this day be conſidered a rule of law, that if a jury entertain a reaſonable DOUBT upon the truth of the teſtimony of witneſſes, given upon the iſſue, they are ſworn well and truly to try, they are bound in conſcience to deliver the priſoner from the charge found againſt him in the indictment, by giving a verdict of not guilty.

Sir EDWARD COKE, *in favorem vitæ*, exhorts juries not to give their verdict againſt a priſoner, without plain, direct, and manifeſt proof of his guilt, which implies, that where there is doubt, the conſequence ſhould be acquittal of the party on trial.

This reaſonable doubt may reſult from various cauſes extrinſic of the evidence given upon oath; for a witneſs may be perfectly competent and ſwear poſitively to a charge, material to the iſſue trying, and yet not deſerve credit from the jury.

The infamy of his character, drawn from himſelf, upon a croſs examination, or given in evidence againſt him by other witneſſes; his intereſt in the event of the proſecution; an apparent influence on his mind; and various

various other circumſtances, may render him unworthy of credit, even on his oath.

So the credit of a witneſs may be materially affected, or totally deſtroyed by his manner of giving evidence. Reſentment or partiality, when prevalent, are apt to ſhew themſelves in the voice and countenance of a witneſs, and, when they do, they are circumſtances which muſt impreſs ſuſpicion upon the mind of a jury. So it often happens, that a witneſs deſtroys the credit of his teſtimony, by inconſiſtency, by prevarication, by the manner of his repreſenting facts, and often by obtruding his own ſentiments and opinions; ſometimes by an exceſs of warmth, ſometimes by a ſolicitous reſerve, and often by—an affectation of candor. In all theſe, and ſimilar caſes, his credibility is, at leaſt, queſtionable; and, unleſs his teſtimony be ſupported by clear and unſuſpicious collateral proof of the facts charged on the priſoner by the indictment, *doubt* muſt ariſe in the minds of the jurors; and, by the humanity of the law, where doubt is created, an acquittal ought to be the conſequence.

Therefore, wherever the evidence warrants the obſervation, the judges conſider it an indiſpenſible duty in charging the jury, to remind them, that as they are intruſted with the adminiſtration of public juſtice on the one hand, and with the life, the honour and the property of the priſoner on the other, their duty calls on them, before they pronounce a verdict of condemnation, to aſk themſelves whether they are ſatisfied, beyond the probability of doubt, that he is guilty of the charge alledged againſt him in the indictment.

And this ſhews, that evidence does not conſiſt in merely the ſwearing to facts—but in the proof of facts, by witneſſes of undoubted credit.

In the trials for high treaſon which took place in London in the year 1794, and thoſe for the ſame offence in Dublin, in conſequence of the rebellion of 1798, the rule above ſtated was fully adopted, not only by the court, but even by the counſel for the proſecution; and, in one caſe, was fully illuſtrated, on principles of law and of humanity. It was the caſe of

The KING, *v.* PATRICK FINNY, at a *Commiſſion of Oyer and Terminer*, Dublin, January 1798, 38 Geo. III. high treaſon.

Mac Nally of counſel for the priſoner, urged, the conſideration of the above rule to the jury, he argued the admiſſion of immorality and of guilt, extracted from *James O'Brien*, the principal witneſs for the crown, by the croſs examination of *Curran*, who was of counſel with him; if it had not totally deſtroyed his credit as a witneſs, it muſt, he ſaid, have created in the breaſts of the jury a *doubt*—a *doubt* which would authoriſe and ſanction them to bring in a verdict of not guilty, for he could aſſert boldly, and without apprehending contradiction, that by the humanity of the law, *doubt* in the breaſt of a jury, was a certain aſſurance of acquittal to the priſoner—indeed, doubt and acquittal might be conſidered ſynonimous terms.

To the rule above laid down, the judges who preſided at the trial alſo adverted in charging the jury—

CHAMBERLAIN, J. B. R. in his charge ſaid—In ſupport of this indictment *James O'Brien* has been produced, but before I ſtate a tittle of his evidence I muſt give you this caution, namely, that if you ſhould be of opinion that he has perjured himſelf, even to a collateral fact upon this trial, you are to reject his teſtimony, unleſs you find that it has been ſo corroborated by circumſtances, or other unimpeachable evidence as to be irreſiſtible.

You are to aſk this queſtion of yourſelves—whether if he were indicted before you, for wilful and corrupt perjury, in anſwer to any queſtion aſked him this day, you would convict him? And if you are of opinion that you would convict *him*, you ought not, in my opinion, to convict the priſoner upon his unſupported teſtimony. And however ſtrongly you may ſuſpect the priſoner, yet it were better that one hundred guilty perſons ſhould eſcape, than make a precedent by which one innocent man might be found guilty upon ſuch teſtimony!

The evidence of a witneſs who perjures himſelf wilfully, even as to a collateral fact, is to be regarded ſtill leſs than that of an approver, who makes a candid and clear confeſſion of every fact in the hearing of a jury; ſuch

ſuch a recital may claim credit. But if a man, in any one inſtance upon a trial, ſhall commit wilful and corrupt perjury, I ſhould be glad to know, whether it will not caſt a DOUBT upon his evidence, as to the main fact which he has been brought to prove? And if there be a *doubt*, I take it to be a clear maxim, founded in humanity as well as law, that you muſt acquit the priſoner. For, in that caſe, the impreſſion made on your minds, can at moſt create a ſtrong ſuſpicion of the priſoner's guilt—but that is not ſufficient to convict him. *Ridgeway's Rep. of Finny's Tr.* 147.

SMITH, B.—You have been told that under an act of parliament frequently alluded to in the courſe of this trial, (*Stat.* 25 *Edw.* 3.) perſons indicted of treaſon ſhall not be convicted except upon "*proveable evidence.*" But though that act never had been made, you would draw the rule from your own hearts, and, you would ſay, you never would find a fellow creature guilty of an offence for which his life muſt be forfeited, except upon evidence full and complete in your minds, and ſuch as ought to ſatisfy your conſciences.

But the great queſtion is, whether the evidence you have heard, can be conſidered as *proof* or not? Whether it be ſuch as would juſtify you in finding the priſoner guilty? I not only think as Mr. Juſtice CHAMBERLAIN does, "that if you were ſitting to determine whether the witneſſes for the crown in the teſtimony they gave this day, were guilty of wilful and corrupt perjury or not; and that you ſhould be of opinion that they were, you ought to acquit the priſoner at the bar;"—but I will go further, and ſay, if you have a DOUBT upon that queſtion; if your minds be in a ſtate of *oſcillation*, you ought in that caſe to acquit the priſoner; becauſe to juſtify a verdict of conviction to yourſelves and to your country, the evidence upon which you decide ſhould be above exception, and not evidence upon which you entertain any doubt. *Ibid.* 153. *and MS.*

So in the KING, *v.* OLIVER BOND, at a *Commiſſion of Oyer and Terminer*, Dublin, July 1798.—CURRAN in his obſervation upon evidence ſpoke to the ſame point—(unfortunately this ſpeech, which evinced the moſt reſplendent

dent talents, is not reported in the trial, and is loſt to poſterity!)—but, as in the former caſe, CHAMBERLAIN, J. admitted the legality of the doctrine, by obſerving, "However trite it may be, I muſt remind you of the "maxim founded in humanity—that if you have any "RATIONAL DOUBT, then, as fair and honourable men, "you muſt acquit." *Ridgeway's Rep. Bond's Trial.* 251.

And this maxim, as it is above rightly called, is now ſo eſtabliſhed as ſcarcely ever to be omitted, even by the counſel for the crown, when ſtating caſes to a jury.

CHAPTER II.

The antient practice of trial by witneſſes; of a judicial oath generally; by whom ſuch oath may be legally adminiſtered; and of the oath adminiſtered to witneſſes in criminal caſes in modern times.

IT was an antient rule of courts of law, that witneſſes were not permitted to be examined on the part of a priſoner, on a proſecution at the ſuit of the crown. 1 *St. Tr.* 72. 173. 182.

As in Sir NICHOLAS THROGMORTON's caſe, *Guildhall, London, April* 1554, 1 *Mar.* before BROMLEY, C. J. B. R. and other commiſſioners, on an indictment for high treaſon. The evidence for the crown being cloſed, the priſoner addreſſed himſelf particularly to the chief juſtice, and ſaid, "What time it pleaſed the queen's "majeſty to call you to this honourable office, I did "learn of a great perſonage of her highneſſes council, "that amongſt other good inſtructions, her majeſty "charged and enjoined you to miniſter the law in juſ-"tice, indifferently without reſpect to perſons. And "notwithſtanding the *old error* amongſt you, which did "not admit any witneſſes to ſpeak, or any other matter "to be heard in favour of the adverſary, her majeſty "being party, her highneſſes pleaſure was, that who-"ſoever could be brought in favour of the ſubject, "ſhould be admitted to be heard. And moreover, that

" *you* ſpecially, and likewiſe all other juſtices, ſhould " not perſuade themſelves to ſit in judgment, otherwiſe " for her highneſs than for her ſubject. Therefore " this manner of indifferent proceeding, being princi- " pally enjoined by God's commandment, and the ſame " being alſo commanded you by the queen's mouth, " methinks you ought of right to ſuffer me to have the " ſtatutes read openly, and alſo to *reject nothing* that " could be ſpoken in my defence, and in thus doing you " will ſhew yourſelves worthy miniſters, and fit for ſo " worthy a miſtreſs."

This reaſonable requeſt of the priſoner, which reflects honour upon the queen, and diſgrace upon the judges, was rejected; the CHIEF JUSTICE only making this extraordinary remark—" You miſtake the matter, " the queen ſpoke theſe words to maſter *Morgan*, the " chief juſtice of the Common Place," and the jury were directed to determine the iſſue upon the *ex parte* evidence for the crown. 1 *St. Tr.* 72.

The conduct of the judge on the above trial, as on many others, that will neceſſarily be cited and adverted to in the courſe of this work, ſhews, that in former times, even in the tribunals of juſtice, law was borne down by factions. In thoſe days, ſays *Erſkine*, " There " were no judges as there are now, to hold firm the " balance of juſtice amidſt the ſtorms of ſtate; men " could not then, as the priſoner can to day, look up " for protection from magiſtrates independent of the " crown, and awfully accountable in character to an " enlightened world. As faſt as arbitrary inſtructions " were aboliſhed by one ſtatute, unprincipled judges " began to build them up again, until they were beat " down by another." An obſervation true and melancholy indeed, and fully ſupported by the conduct not only of chief juſtice BROMLY, but of Sir *Edward Coke*, called the oracle of the law—and the philoſophic lord *Bacon*, who has been ſtiled the greateſt and the meaneſt of mankind. The inhumanity of the one in Sir *Walter Raleigh*'s caſe, and the mean ſubſerviency of the other in *Peachum*'s caſe, fully juſtifies another obſervation of *Erſkine* on *Hardy*'s trial; " My " reſpectable

" reſpectable and learned friend, the Attorney-General " (Sir *John Scott*) has not cited caſes which have been " the diſgrace of this country in former times; nor " aſked you to ſanction by your judgments, thoſe bloody " murders which are recorded by them as acts of Eng- " liſh juſtice." *Hardy's Tr. vol.* 3. 188. *Foſt.* 199.

Of the OATH.—Sir EDWARD COKE defines the word thus, Oath, he ſays, is a word derived of the *Saxon* word *eoth*, and is expreſſed by three ſeveral names, viz. firſt, *Sacramentum, a ſacra, et ſacramente*; becauſe it ought to be performed with a religious *quia jurare, eſt Deum in teſtem vocare et eſt actus divini cultus.*

Secondly, *Juramentum a jure*, which ſignifieth law and right, becauſe both are required and meant, or becauſe it muſt be done with a juſt and rightful mind.

Thirdly, *Jus-jurandum*, compounded of two words, *a jure et jurando.*

In common law *ſacramentum* is moſt commonly uſed—In our books and antient ſtatutes, publiſhed in French *ſerement*, if the French word *ſerment* is uſed. 3 *Co. Inſt.* 165. *Fleta li.* 5. *ca.* 2. *Brit. ca.* 97. *fo.* 237. *li.* 8. *fo.* 19, 74, 134, 165, 236. *Flet. li.* 5. *ca.* 11.

According to the above authority, it was reſolved in the caſe of an under-ſheriff, 26 *Eliz.* that an oath is an affirmation or denial by any *chriſtian* of any thing lawful and honeſt, before one or more, that have authority to give the ſame, for advancement of truth and right, calling ALMIGHTY GOD to witneſs that his teſtimony is true. And it is two-fold, either *aſſertorium ut de præterito, ſicut teſtes, &c. ſeu promiſſorium de futuro, ſicut Judices, juſticiarii officiarii, &c.*

So as an oath is ſo ſacred and ſo deeply concerneth the conſciences of chriſtian men, as the ſame cannot be miniſtered to any, unleſs the ſame be allowed by the common law, or ſome act of parliament; neither can any oath allowed by the common law, or by act of parliament, be altered but by act of parliament. 3. *Inſt.* 165.

It is called a corporal oath, becauſe the witneſs toucheth with his hand ſome part of the holy ſcripture. 3 *Inſt.* 165.

There

There are ſeveral ſorts of oaths in our law, viz. *juramentum promiſſionis*, where oath is made to do, or not to do ſuch a thing. *Juramentum purgationis*, where a perſon is charged with any matter in a bill in chancery, &c. *Juramentum probationis*, where any one is produced as a witneſs, to prove or diſapprove any thing. And *juramentum triationis*, when any perſons are ſworn to try an iſſue. 2 *Neſſ.* 1181.

Rule the Firſt.

As all oaths muſt be lawful and allowed by the common law or ſome ſtatute; ſo if they are adminiſtered by perſons in a private capacity, or not duly authorized, they are *coram non judice*, and void; and thoſe adminiſtering them are guilty of a high contempt for ſo doing, without warrant of law, and puniſhable by fine and impriſonment. 3 *Inſt.* 165. 4 *Inſt.* 278. 2 *Roll. Abr.* 257. 4 *Blackſ. Comm.* 137.

Rule the Second.

It hath always been agreed, that the evidence for the king muſt in all civil caſes be upon oath; and alſo that the evidence for the defendant, in an appeal, whether capital or not capital; or in an indictment, or information for a miſdemeanor, or miſpriſion of treaſon, muſt be upon oath: but on the part of the priſoner witneſſes were not examined on oath, till enabled by ſtatute. *Hawk. Pl. Cr. ca.* 46. *poſt.* 13.

Sir EDWARD COKE reprobates the refuſal of witneſſes upon oath to the priſoner, and ſays, "We never read "in any ſtatute, antient author, book, caſe, or record, "that in criminal caſes the party ſhould *not* have his "witneſſes ſworn for him, and therefore there is not "ſo much as a *ſcintilla juris* againſt it." 3 *Inſt.* 79. 4 *St. Tr.* 178.

And then he ſtates an anecdote, that the lord treaſurer *Burleigh*, on introducing him to queen Elizabeth, ſaid, "Madam, here is your Attorney-General, *Qui pro* "*Domina Regina ſequitur.*" Her majeſty ſaid, "I will

" have the record altered, for it ſhould be *Attornatus* " *Generalis qui pro Domina veritate ſequitur.*" And when the fault is denied, truth cannot appear without witneſſes. 3 *Inſt.* 79.

Sir MATTHEW HALE held the ſame opinion. His words are, regularly the evidence for the priſoner in caſes capital is given without oath, though the reaſon thereof is not manifeſt; but, otherwiſe it is in all caſes not capital, though it be miſpriſion of treaſon. But in ſome ſpecial felonies by act of parliament, the priſoner's witneſſes in caſes capital ſhall be examined upon oath at his trial: namely, the ſtatute againſt embezzling the queen's ordnance, by which it is provided, that " Any " perſon impeached for ſuch felony, ſhould be received " and admitted to make any lawful proof that he could " by lawful men." *Stat.* 31 *Eliz. ca.* 4.

And the HOUSE OF COMMONS were ſo ſenſible of the abſurdity of denying the priſoner witneſſes upon oath, that in the bill for aboliſhing hoſtilities between England and Scotland, when felonies committed by Engliſhmen in Scotland, were ordered to be tried in one of the three northern counties, they inſiſted on a clauſe and carried it, againſt the efforts both of the crown and the houſe of lords, againſt the practice of the courts of England, and the expreſs law of Scotland, "That in all ſuch " trials, for the better diſcovery of the truth, and the " better information of the conſciences of the jury and " juſtices, there ſhall be allowed to the party arraigned " the benefit of ſuch credible witneſſes to be examined " upon oath for his clearing and juſtification." *Stat.* 4. *Jac.* 1. *c.* 1.

In the KING, *v.* COLLEGE, *Oxford*, 33 *Car.* 2. 1681, for high treaſon, before NORTH, C. J. JONES, RAYMOND and LEVINZ, J. One *William Serwin* being called as a witneſs for the priſoner, the chief juſtice ſaid to him, " Look you here friend, you are not to be ſworn; " but when you ſpeak in a court of juſtice, you muſt " ſpeak as in the preſence of God, and only ſpeak what " is true." 3 *St. Tr.* 369.

So in the KING, *v.* TURNER, *Old Bailey*, *January* 1663, 15 *Car.* 2. Felony and Burglary. The priſoner

ſoner begged an order to bring in ſome witneſſes, who from fear refuſed to come, unleſs ſummoned: but he was anſwered by the chief-juſtice of the king's bench, lord HYDE, "We will help what the law will do; but "this cannot be done. Thoſe that will come in volun- "tarily may. The law will not allow us to ſummon "any witneſſes: you ſee, where they come againſt the "king we cannot put them to their oaths, much leſs "can we precept them to come." 2 *St. Tr.* 505.

Sir JOHN HAWLES, in his remarks on *College*'s trial, above cited, conſiders the denying that witneſſes ſhould be examined upon oath, for a priſoner capitally charged, to be a hardſhip that gives colour to the impoſing of other hardſhips. The denial of ſuch evidence, he ſays, is not becauſe the matter is capital, for then no witneſſes ought to be examined upon oath for the appellee, in a capital matter. Neither is it becauſe it is againſt the king, for then no witneſs ought to be examined upon oath for the defendant, in a trial upon an indictment for any criminal matter; yet in indictments of all criminal matters, not capital, it is permitted to the priſoner. 4 *St. Tr.* 178.

To ſay truth, never any reaſon was ever given for it, or can be if you believe my lord *Coke*, or my lord *Hale*, that that practice is not warranted by any act of parliament, book, caſe, or antient record, and that there is not ſo much as *ſcintilla juris* for it. For he ſays, when the fault is denied, truth cannot appear without witneſſes. 3 *Inſt.* 79. 2 *Hale, Pl. Cr.* 283. Both cited *ante* 9. 4 *St. Tr.* 178.

As for what is pretended, that it is ſwearing againſt the king, and therefore is not allowed of, it is a canting reaſon, which put into ſenſible Engliſh, a man will be aſhamed to own. And as ſlight is the reaſon, that it being a matter of ſo high moment as a man's life, the priſoner will be the more violent and eager, and the witneſſes may be more prevailed upon to ſwear falſely, more than they would be in a matter of leſs moment. None will deny but the end of trials in any matters capital, criminal or civil, is the diſcovery of truth: next, it is as neceſſary for the priſoner to have witneſſes to prove his innocence, as it is for the king to have witneſſes to

convict him of the crime; which propoſition is agreed by the practice, it being always permitted that the priſoner ſhall produce what witneſſes he can, but they are not to be on oath. 4 *St. Tr.* 178.

In the laſt place ſince truth cannot appear, but by the confeſſion of the party, or teſtimony of witneſſes of both ſides, it is neceſſary to put all the engagement, as well of the witneſſes of part of the priſoner, as of part of the king, to ſay the truth, the whole truth, and nothing but the truth, as the nature of the matter will bear: and as yet no better means has been found out than an *oath*, which if denied to the priſoner's witneſſes, either he is allowed too great an advantage to acquit himſelf, or he is not allowed enough. 4 *St. Tr.* 178.

If all that his witneſſes ſay without oath, ſhall have equal credit as if they ſwore it, then he hath too much advantage, for men may be found who will ſay falſely what they will not ſwear. How then doth a defendant ſay in a *plea at law* that a deed is not his, which yet in an *anſwer in Chancery* he will confeſs to be his? If his witneſſes ſhall not have credit, becauſe not ſworn, to what purpoſe then is it permitted him to produce them? If they ſhall have credit, but not ſo much as if ſworn, how much credit ſhall be given? Is it two, three, or ten witneſſes, without oath, ſhall be equivalent to one upon oath? And beſides, that queſtion never was nor can be anſwered, what credit ſhall be given them? There is an unreaſonable diſadvantage put on the priſoner, that a witneſs produced on his part of equal credit with the witneſs againſt him, ſhall not have equal credit given him, becauſe he is not on his oath, whereas he is ready to deliver the ſame things on his oath, if the court would adminiſter it to him: and yet that difference was taken in *Fitzharris's caſe*, 33 *Car.* 2. 3 *St. Tr.* 224. as to the credibility of *Everard* and *Oates*, the firſt being on his oath, the laſt not. 4 *St. Tr.* 178.

The above oppreſſive *rule* of the courts, of law it cannot be called, for common law is common ſenſe, and common ſenſe repels cruelty and oppreſſion, was, as Sir *William Blackſtone* ſtates, an antiently and commonly received practice, derived from the civil law, and which

which alſo to this day (the time of his writing) obtains in the kingdom of France. But to remedy a practice ſo partial, cruel, and ſubverſive of public juſtice, in caſes where the crown was immediately concerned, it was provided by ſtatute, after the Revolution, "That every "perſon indicted for high treaſon, whereby corruption "of blood may be made, ſhall be admitted to make his "defence by witneſſes, on oath." 7 *Will.* 3. *ca.* 3. 4 *Blackſt. Comm.* 352, 353, 354.

But this ſtatute being found defective, and not ſufficiently extenſive to remedy the inconvenience complained of, and there having been a conſtant immemorial practice, not to ſuffer witneſſes to be ſworn againſt the king; and the judges, (ſays *Hawkins*) being always tender of departing from the ſettled practice of their predeceſſors, and generally chuſing rather to preſume the evil (for an evil many of them acknowledged it to be) originally founded on ſome ſtatute, or other good foundation, than to ſuffer the reaſonableneſs of it to be nicely entered into, which might be an inlet to endleſs uncertainties, it was thought neceſſary further to enact— "That every perſon who ſhall be produced or appear as "a witneſs, on behalf of the priſoner, before he, or "ſhe, be permitted to depoſe, or give any manner of "evidence, ſhall firſt take an OATH, to depoſe *the truth*, "*the whole truth, and nothing but the truth*, in ſuch man- "ner as the witneſſes for the queen are by law obliged "to do; and if convicted of any wilful perjury in ſuch "evidence, ſhall ſuffer all the puniſhments, penalties, "forfeitures, and diſabilities, which by any of the laws "and ſtatutes of this realm are, or may be inflicted "upon perſons convicted of wilful perjury." *Stat.* 1 *Ann. ca.* 9. *ſect.* 3. *Iriſh ſtat.* 9 *Ann. ca.* 6. *ſect.* 9. 2 *Hawk. P. C. ca.* 46.

It is alſo now ſettled law, although Lord *Coke* in his definition of an oath, intimates that none but *Chriſtians* can be witneſſes; though his opinion is not warranted by any authority, but contradicted by common experience, that Jews and all other perſons profeſſing to believe in a GOD, though neither believing in the old nor new teſtament, as Mahometans, Moors, Gentoos, Indians, &c. may

&c. may be witneſſes, if ſworn according to the ceremonies of the religion they profeſs. 1 *Atkins* 31.

CHAPTER III.

Of opening to the court the nature of the evidence intended to be given.

Rule.

COUNSEL ought not to call witneſſes without firſt opening to the court the nature of the evidence they intend to examine to. This has been often ſolemnly adjudged, though not ſtrictly adhered to in practice.

As in the caſe of AMBROSE ROOKWOOD, ſeſſions of *Oyer* and *Terminer*, at *Weſtminſter*, 8 *Will.* 3. before HOLT, C. J. and TREBY, POWELL and AYRE, J's. 4 *St. Tr.* 661.

And alſo in ANNESLEY, *v.* The EARL of ANGLESEY. *Excheq. Ireland*, 1743. 16 *Geo.* 2. 9 *St. Tr.* 380.

CHAPTER IV.

In what caſes evidence muſt be given in the preſence of the priſoner.

Rule the Firſt.

IT is a ſettled rule of law, that no evidence is to be given againſt a priſoner but in his preſence. 2 *Hawk. P. C. ca.* 46.

And therefore in the KING, *v.* PAINE, *B. R. Hil.* 7 *Will.* 3. on an information againſt the defendant, charging him as the compoſer, author and publiſher of a malicious libel, againſt the late queen ANNE, ſtiled, "Her Epitaph:" it became a queſtion, whether the depoſitions

of

of one *Brereton*, who was dead, which had been taken before the mayor of Briſtol, the priſoner not being preſent, ſhould be read.

And the COURT of KING'S BENCH, after taking the opinion of the COURT of COMMON PLEAS then ſitting, determined that theſe depoſitions ſhould *not* be given in evidence, the defendant not being preſent when they were taken by the magiſtrate, and ſo had loſt the benefit of a croſs examination. 5 *Mod.* 165.

Rule the Second.

The determination in the above caſe having never been queſtioned, it appears to be eſtabliſhed, that the depoſitions of a witneſs taken *ex parte*, before a magiſtrate, on an examination concerning a *miſdemeanor*, cannot be read in evidence on the trial of the party after the death of the deponent. 1 *Salk.* 281. *Holt.* 294. *Comb.* 358. *S. C.*

And the ſtatute of 2 and 3 *Philip* and *Mary*, *ca.* 10. which permits informations of perſons deceaſed taken judicially, that is in the preſence of the party charged, to be read in evidence, after the death of the party ſwearing, is confined to felonies. *Iriſh Stat.* 10 *Car.* 1. *ca.* 18. 2 *Hawk. P. C. ca.* 46.

CHAPTER V.

Of the number of witneſſes required in capital caſes at common law and by ſtatute; with readings on the ſtatutes of EDWARD *the Sixth,* PHILIP *and* MARY, *and* WILLIAM *the Third, reſpecting the number of witneſſes neceſſary to a conviction for high treaſon.*

Rule the Firſt.

IN caſes of *felony* a ſingle *credible* witneſs has always been conſidered ſufficient to convict a priſoner.

The epithet "*credible*" has a clear preciſe meaning. It is not a term of art appropriated only to legal notions but

but has a ſignification univerſally received. It is never uſed as ſynonimous to *competent*; when applied to teſtimony it pre-ſuppoſes the evidence given. After the *competence* of a witneſs is allowed, the conſideration of his credibility ariſes, and not before. Perſons undoubtedly credible cannot be witneſſes under particular circumſtances: perſons manifeſtly incredible may be, and often are witneſſes. In acts of parliament which direct convictions upon the oaths of witneſſes, the epithet "*credible*" is added, but by no means intended to ſignify *competent*, that is implied in the term "*witneſs*," but it is intended, from abundant caution to declare, that though competent witneſſes ſwear poſitively, their credibility is to be weighed; and if the magiſtrate thinks the evidence not credible, he ought not to convict. *Wyndham, v. Chetwynd*, 1 *Burr.* 414. *Vide Abraham's, v. Bunn. poſt.*

From the above opinion of Lord MANSFIELD, and his deciſion in the other caſe cited, it is clear that the queſtion of *competency* is to be determined by the *Court*, the queſtion of *credibility* by the *Jury*.

Rule the Second.

In caſes of *treaſon* as well as in caſes of *felony*, the evidence of *one* credible witneſs, has from the Norman conqueſt down to the firſt year of *Edward* the ſixth, alſo been held ſufficient to convict.

And ſo it is held by *Hawkins*, who ſays, to ſupport an indictment for high treaſon, before the firſt of *Edward* the ſixth, no certain number of witneſſes was required upon the indictment; or trial of any other crime whatever. 2 *Hawk. P. C. ca.* 25. 3 *Keble* 68. *B. Corone* 228. 2 *Jones* 233.

For it appears to be generally agreed, that the ſtatute of the 1 *and* 2 of *Philip and Mary*, in reſtoring the order of trial by the courſe of the common law, took away the neceſſity of *two* witneſſes in all caſes within thoſe ſtatutes; from whence it plainly ſeems to follow, that

that they were not required by the common law. 2 *Hawk. P. C. ca.* 25. *B. Cor.* 220. *S. P. C.* 164.

And in *Trinity* 2 and 3 of *Philip* and *Mary*, a doubt having arisen among the judges and king's serjeants, on statute 35 *Hen.* 8. *c.* 2. which enacts, "That all "trials hereafter to be awarded or made for any treason, "shall be had and used only according to the due order "and course of the common law of this realm, and "not otherwise, &c." it was resolved that the intent of the statute of *Philip* and *Mary*, *ca.* 10. was to remove the two accusers and two witnesses. *Dyer* 132. 1 *Jones* 123. *Keil.* 18. 49.

And Sir MATTHEW HALE in his reading on this statute, says, That as to all other persons, except clipping and coining, it has been controverted whether the general clause in the statute of *Philip* and *Mary*, *ca.* 11. hath taken away the necessity of two witnesses upon the trial, if there were no more in the case. 1 *Hale, P. Cr.* 298, 299, 300.

However, it has been holden by some, that by the antient common law, *one* witness was not sufficient to convict any person of *high treason*. But granting that one witness was not sufficient for a conviction, it doth not follow but he might be sufficient for an indictment. 2 *Hawk. P. C. ca.* 25. See Sir JOHN FENWICK's case 5 *St. Tr.* 70.

That two witnesses were required at common law, was the opinion of Sir EDWARD COKE. The words of that great lawyer are—"But it seemeth by the ancient "common law, one accuser or witness was not suffi-"cient to convict any person of high treason; for in "that case, where there is but an accuser, it shall be "tried before the constable and marshal, by combat, as "by many records (which he cites) appeareth. But "the constable and marshal have no jurisdiction to hold "plea of any thing which may be determined or dis-"cussed by the common law. And that two witnesses "be required appeareth by our books, and I remember "no authority in our books to the contrary; and the "common law herein is grounded upon the LAW OF "GOD, expressed in the Old and New Testament. *In*

" *ore duorum aut trium teſtium peribit qui interficietur:*
" *Nemo occidatur uno contra ſe dicente teſtimonium.* 3 *Inſt.* 26.

The paſſages of Scripture to which the learned COKE refers as authentic, are:

Firſt, At the mouth of two witneſſes or three witneſſes ſhall he that is worthy of death be put to death: but at the mouth of one witneſs he ſhall not be put to death. *Deutr. ca.* 17. *v.* 6.

Second, One witneſs ſhall not riſe up againſt a man for any iniquity or for any ſin, in any ſin that he ſinneth; at the mouth of two witneſſes, or at the mouth of three witneſſes ſhall the matter be eſtabliſhed. *Deutr. ca.* 19. *v.* 15.

Third, But if he will not hear thee then take with thee one or two more, that in the mouth of two or three witneſſes every word may be eſtabliſhed. *Matthew ca.* 18. *v.* 16.

Fourth, This is the third time I am coming to you, in the mouth of two or three witneſſes ſhall every word be eſtabliſhed. 2 *Corint. ca.* 13. *v.* 1.

Fifth, He that deſpiſeth MOSES's law died without mercy under two or three witneſſes. *Hebr. ca.* 10. *v.* 28.

Serjeant HAWKINS commenting on the above opinion of the author of the inſtitutes obſerves, that however the law might have ſtood in relation to thoſe matters before the conqueſt, it ſeems to be wholly altered long before the *ſtat. Edw.* 6. and it is not ſupported by the generality of the authorities cited by Sir EDWARD COKE, which wholly relate either to the proof of an eſſoin, or a ſummons in a real action, or of the default of perſons ſummoned on a jury, or other matters leſs to the point. And HAWKINS cites *Brac.* 354. 35 *Hen.* 6. 46, 47. 48 *Edw.* 3. 30. 15 *Edw.* 4. 1. 2. *Hawk. P. C. ca.* 25. *ſect.* 129.

And as to the paſſages of Scripture, he ſays, it may be anſwered, that thoſe in the Old Teſtament concern only the judicial part of the Jewiſh law, which being formed for the particular government of the Jewiſh nation, doth not bind us any more than the ceremonial; and that in the New Teſtament contain only prudential rules for the direction of the government of the church

in

in matters introduced by the goſpel, and no way controul the civil conſtitution of countries. *Ibid.*

To which may be added that, whatever may be ſaid either from reaſon or from ſcripture, for the neceſſity of two witneſſes in treaſon, holds as ſtrongly in other capital cauſes, and yet it is not pretended that there is, or ever was any ſuch neceſſity in relation of any other crime but treaſon. 2 *Hawk. P. C. ca.* 45. 1 *Hales P. C.* 299.

Baron MONTESQUIEU, in his twelfth book, which treats of thoſe laws that form political liberty as relative to the ſubject, ſays, thoſe laws which condemn a man to death on the depoſition of a ſingle witneſs, are fatal to liberty. In right reaſon there ſhould be two; becauſe a witneſs who affirms, and the accuſed who denies, make an equal balance, and a third muſt incline the ſcale. *Spirit of Laws, b.* 12. *ca.* 3.

The marquis BECCARIA delivers the ſame opinion in nearly the ſame words. In his judgment, one witneſs is not ſufficient; for whilſt the accuſed denies what the other affirms, truth remains ſuſpended, and the right that every one has to be believed innocent turns the balance in his favour. *Eſſay on crimes and Puniſhments*, 35.

Sir WILLIAM BLACKSTONE conſiders this opinion as carrying matters too far, for there are ſome crimes in which the very privacy of their nature excludes the poſſibility of having more than one witneſs: muſt theſe therefore eſcape unpuniſhed? Neither indeed is the bare denial of the perſon accuſed equivalent to the poſitive oath of a diſintereſted witneſs. In caſes of indictment for perjury this doctrine is better founded, and there our law adopts it, for one witneſs is not allowed to convict a man indicted for perjury, becauſe then there is only one oath againſt another. In caſe of treaſon alſo there is the accuſed's oath of allegiance to counterpoiſe the information of a ſingle witneſs; and that may perhaps be one reaſon why the law (in England *not* in Ireland) requires a double teſtimony to convict him. Though the principal reaſon undoubtedly is, to ſecure the ſubject from being ſacrificed to the fictitious conſpiracies which have been engines of profligate and

crafty politicians in all ages. 4 *Comm. ca.* 27. *p.* 351. Vide *the rev. William Jackſon's caſe. Poſt.*

Another reaſon may be added, that in proportion to the atrocity of the offence, the evidence againſt the party charged ſhould be credible, ſtrong and concluſive.

Chief juſtice KELYNG ſays, the queſtion, whether at this day there needs be two witneſſes to convict a man of high treaſon, hath grown only upon the opinion of COKE, who, amongſt other things, delivers an opinion that, at common law, two witneſſes are neceſſary in caſes of treaſon, and cites many books in the margin: but none of them warrant any ſuch opinion, and there are many things in his poſthumous works, eſpecially in his "Pleas of the Crown" concerning treaſons, and in his "Juriſdiction of the Courts" concerning parliaments, which lie under a ſuſpicion whether they received no alteration, they coming out in the time of that which is called the long parliament, in the rebellion againſt king *Charles* the firſt. *Kelyng* 49.

It has been before ſtated, that previous to *ſtat.* 1. *Edw.* 6. no certain number of witneſſes was required upon the indictment or trial of any crime whatever. 2 *Hawk. P. C. ca.* 25. 3 *Keb.* 68. 2 *Jones* 233.

For it ſeems, ſays *Hawkins*, to be generally agreed, that the *ſtatutes* 1 *and* 2 *Phil. and Mary*, in reſtoring the order of trial to the courſe of the common law, took away the neceſſity of two witneſſes in all caſes within thoſe ſtatutes, from whence it ſeems to follow, that they were not required by the common law. 2 *Hawk. P. C. ca.* 25.

In lord STAFFORD's caſe, 23 *Car.* 2. *anno* 1681, it became a queſtion, whether two witneſſes were neceſſary, as required by the 1 *Edw.* 6. *ca.* 12. *and* 5 *Edw.* 6. *ca.* 11. which require two witneſſes for convicting a traitor and for finding the indictment? And, NORTH, C. J. and his brethren held, that when the priſoner is charged with the offence of killing the king, and that the evidence is, that he ſeveral times laboured it, and by ſeveral ways, and to each particular time and fact there is but one witneſs, and yet that every of the ſaid facts conduced directly to the effecting and perpetration of the

the fact and treaſon charged upon the priſoner, ſuch evidence was ſufficient within the ſtatute. But otherwiſe it had been if the fact had been tending to another ſeveral treaſon. And the reaſon given by the learned judges, why ſuch evidence was good, was—becauſe otherwiſe it would be a moſt difficult thing, and almoſt impoſſible to convict any one of high treaſon for compaſſing the death of the king, for ſuch compaſſings are ſeldom acted in the preſence of two witneſſes at one time preſent. On this occaſion, in the houſe of lords it was ſuggeſted, that the reaſon of two witneſſes in treaſon was, that antiently all or moſt of the judges were churchmen and eccleſiaſtical perſons, and by the canon law now, and then, in uſe all over the chriſtian world, none can be condemned of hereſy, but by two lawful and credible witneſſes; and bare words may make a heretic but not a traitor, and antiently hereſy was treaſon, and from thence the parliament thought fit to appoint that two witneſſes ought to be for proof of high treaſon. *Ray.* 408.

Rule the Third.

In England no perſon can be legally accuſed or convicted of treaſon, except treaſon reſpecting the coin, but on the evidence of at leaſt two lawful witneſſes.

By *ſtat.* 1 *Edw.* 6. *ca.* 12. It is enacted, "That no "perſon or perſons ſhall be indicted, arraigned, or con- "demned, or convicted of any offence of treaſon, petit- "treaſon, or miſpriſion of treaſon, &c. unleſs the ſame "offender or offenders be accuſed of two ſufficient law- "ful witneſſes, or ſhall willingly without violence con- "feſs the ſame." This ſtatute was never enacted in Ireland.

By *ſtat.* 5 *and* 6 *Edw.* 6. *ca.* 11. *ſec.* 8. it is further enacted, "That no perſon or perſons ſhall be indicted, "arraigned, condemned, convicted, or attainted for "any of the treaſons in the act mentioned, or for any "other treaſons which then were, or after ſhould be, "which ſhould be perpetrated, committed, or done, "unleſs the ſame offender or offenders be thereof ac-

"cuſed

" cuſed by two lawful accuſers; which ſaid accuſers at " the time of that arraignment of the party ſo accuſed, " if they be then living, ſhall be brought in perſon be- " fore the party ſo accuſed, and avow and maintain " what they have to ſay againſt the ſaid party to prove " him guilty of the treaſons or offences contained in the " bill of indictment laid againſt the party arraigned, " unleſs the ſaid party arraigned ſhall willingly, without " violence, confeſs the ſame." No ſuch ſtatute in Ireland.

By *ſtat.* 1 *and* 2 *Phil. and Mary ca.* 11. it is enacted, " That all trials after that ſtatute to be had, awarded, " or made, for any treaſon, ſhall be had and uſed only " according to the due courſe and order of the common " law."

Alſo, by *ſtat.* 1 *and* 2 *of Phil. and Mary, ca.* 11. it is enacted, " That all and every perſon and perſons who " ſhall be accuſed or impeached of any of the offences " contained in that ſtatute, or of any other offence or " offences concerning the impairing, counterfeiting, or " forging of any coin current within this realm, ſhall " and may be indicted, arraigned, tried, convicted, or " attainted by ſuch like evidence, and in ſuch manner " and form as has been uſed and accuſtomed within the " realm, at any time before the firſt year of *Edw.* 6."

By *ſtat.* 7 *Will.* 3. *ca.* 3. it is enacted, " That no " perſon or perſons whatſoever, ſhall be indicted, tried, " or attainted of high treaſon, whereby any corruption " of blood may or ſhall be made to any ſuch offender " or offenders, or any the heir or heirs of ſuch offender " or offenders, or of miſpriſion of ſuch treaſon, but by " and upon the oaths and teſtimonies of *two* lawful wit- " neſſes, both of them to the ſame overt act, or one of " them to one, and another of them to another overt " act of the ſame treaſon, unleſs the party indicted or " arraigned, or tried, ſhall willingly, without violence, " in OPEN COURT confeſs the ſame, or ſhall ſtand mute " or refuſe to plead, or in caſes of high treaſon ſhall " peremptorily challenge above the number of thirty- " five of the jury."

On the above cited Engliſh ſtatutes, ſo far as they reſpect the neceſſity of two witneſſes, the following par- ticulars

ticulars have been laid down as rules, by ſerjeant HAWKINS, in his Pleas of the Crown. *Vol.* 2. *ca.* 25.

Rule the Fourth.

That where the ſtatute of the 1 *of Edw.* 6. require that the party be accuſed by two lawful witneſſes, and that the 5 *and* 6 *Edw.* 6. that he be accuſed by two lawful accuſers, they both mean the very ſame thing, becauſe the common law admits of no other accuſers but witneſſes. 2 *Haw. P. Cr. ca.* 25.

And the ſame point is agreed by ſir MATTHEW HALE and ſir EDWARD COKE. *Hale's P. C.* 301. 3 *Inſt.* 25.

This rule is ſupported in the caſe of *Chriſtopher Low*, before the high court of juſtice. HALE, who was his counſel, inſiſted, that two witneſſes are neceſſary upon the trial in caſe of treaſon, upon the foot of the ſtatutes of *Edw.* 6. *not repealed*, he ſaith, in *point of teſtimony* by the ſtatute of *Phil. and Mary*: and ſir *Thomas Witherington*, one of the counſel on the ſide of the proſecution, who argued with candor, admitted that the ſtatutes of *Edw.* 6. are not repealed by that of *Phil. and Mary*; and that two witneſſes are ſtill neceſſary; but inſiſted that one witneſs to one overt-act and another to another overt-act of *the ſame ſpecies of treaſon*, are two witneſſes within the act. And ſo it has been held ever ſince the reſtoration. 2 *State Tr.* 144, 171, to 173 and 177. *Foſt.* 235. 1 *Hale, P. Cr.* 296. *Summ.* 262.

And adds *Foſter*, this gentleman (ſir *William Witherington*) was the firſt who conſidered the point in this light, in which it hath been conſidered ever ſince the reſtoration. *Foſt.* 235.

Rule the Fifth.

It is not required either by ſtatute the *firſt or the fifth and ſixth of Edward the ſixth*, that ſuch accuſers or witneſſes be preſent with the indictors in perſon, but that they may ſend their accuſation to the indictors in writing under their hands, which will be ſufficient, even after

their

their death. 2 *Hawk. P. C. ca.* 25. *S. P. C.* 164. *B. Coranæ* 2. *Summ.* 208.

Sir EDWARD COKE declares a contrary opinion. He ſays, it is moſt neceſſary as many do hold, that there ſhould be two lawful *accuſers*; that is, two *lawful witneſſes at the time of the indictment*; for, the indictment is commonly found in the abſence of the party accuſed, and it may be when the party ſuſpected is beyond ſea, or in remote parts, and may be outlawed thereupon, and therefore ſeeing the indictment is the foundation of all, it muſt be neceſſary to have ſubſtantial proof in a caſe ſo criminal, where *probationes oportent eſſe luce clariores.* 3 *Inſt.* 25, 26.

It is obſervable, that none of the commentators on the acts of *Edw.* 6. expreſsly ſay, that ſuch accuſation muſt be upon oath. But it is clear it cannot be intended that the accuſation may be without oath, for how can any accuſer be ſaid to be a lawful witneſs, if he be not upon oath; ſir MATTHEW HALE alſo expreſsly ſays, that the party to the treaſon that confeſſed it, may be one of the two accuſers or witneſſes in caſe of treaſon, for the ſtatute *intended* two ſuch witneſſes that were *allowable witneſſes at common law:* and at common law no witneſs can be examined but on oath. 2 *Hawk. P. C. ca.* 25. 1 *Hale P. C.* 304. *Leach, Cr. Ca.* 128. *Poſt*.

But if any reaſonable doubt exiſted on this point, it is now completely ſettled by 7 *Will.* 3. as to the treaſons within that ſtatute, which expreſsly provides, "That no "perſon ſhall be *indicted* thereof but by and upon the "*oath* and *teſtimony* of two lawful witneſſes."

Rule the Sixth.

One who can only witneſs by hearſay what he has heard a good witneſs ſay, is not a lawful accuſer within any of theſe ſtatutes. For, if this were to be allowed, nothing would be more eaſy than in any caſe, where there is one witneſs, to get a ſecond, which would totally elude the proviſion of the ſtatutes in requiring two lawful witneſſes. 2 *Hawk. P. C. ca.* 25.

Yet

Yet in THOMAS's caſe, *Eaſt.* 1 *Mary*, it was holden for law, that of two accuſers, if one be an accuſer of his own knowledge, or of his own hearing, and he relate it to another, the other may well be an accuſer; and thus did ſir *Nicholas Arnold*, who accuſed *William Thomas* of words which ſounded and tended to the death and deſtruction of the queen, of his own hearing, and at the requeſt of *William Thomas*, he reported over the ſame matter to ſir *James Crofts*; ſir *James Crofts* may be an accuſer in this caſe with *Arnold*; and ſir *James Crofts* reports this over to *John Fitzwilliams*, who was ſuppoſed a man fit to have killed the queen, and he reports it over to ſir *Thomas Wyat*, &c. ſo each of them may be an accuſer. *Dyer* 99. *b.*

This abominable and illegal doctrine, or as ſir EDWARD COKE terms it, this *ſtrange conceit*, that one may be an accuſer by hearſay, was utterly denied by the juſtices in the lord *Lumley*'s caſe. *Hil.* 14 *Eliz.* 3 *Co.* 25.

But if it be hearſay from the offender himſelf, confeſſing the fact, ſuch a teſtimony upon hearſay makes a good witneſs within the ſtatute. 1 *Hale, P. C.* 306. *Vide Confeſſion. Poſt. ca.*

On the above caſe of *William Thomas*, FOSTER has animadverted with unuſual ſeverity and marked reprobation.

"I do not find," ſays that excellent judge, "upon "looking over the ſtate trials, that in crown proſecu- "tions any great regard was paid to the acts of *Edw. 6.* "for near a century after they were paſſed, or indeed "to the common well-known rules of legal evidence. "Though the authors who wrote in thoſe days do ſome- "times ſpeak of the acts as then in force. In the caſe "of *William Thomas*, when they were undoubtedly in "force, they were rendered quite nugatory by this very "extraordinary reſolution, that *one witneſs of his own* "*knowledge, and another by hearſay from him*, though at "the *third or fourth hand*, made two witneſſes or accu- "ſers within the act." *Poſt.* 234. And,

In the caſe of ſir NICHOLAS THROCKMORTON, which came to trial the ſame term, no ſort of regard was paid to them. For though the priſoner ſtrongly inſiſted on

the benefit of them, particularly of that which requireth the witneſſes to be brought face to face upon the trial; the counſel for the crown went on in the manner formerly practiſed, reading examinations and confeſſions of perſons ſuppoſed to be accomplices, ſome living and ameſnable, and others lately hanged for the ſame treaſon. *Ibid.* 1 *St. Tr.* 68.

In many of the ſucceeding trials, the priſoners were told that the ſtatutes of *Edw.* 6. *were repealed*; particularly that which required two witneſſes face to face; that this law hath been found dangerous to the crown; that witneſſes may be prevailed upon to unſay in court what they have ſaid upon their examinations; that the confeſſion of perſons accuſing themſelves are the ſtrongeſt of all evidence againſt their accomplices; that their partners in guilt are *gens de leur condition* the ſtatute of treaſons ſpeaks of; and that confeſſions though not ſigned by the party, are of equal weight with thoſe that are ſigned. *Ibid.*

This every man who will do ſo much penance as to read over the ſtate trials during the reigns of queen *Elizabeth* and king *James*, will find to have been the doctrine and practice of the times! *Ibid.*

In ſucceeding times, when people of all ranks and parties had in their turn been learning moderation in the ſchool of adverſity, light began to dawn upon us. Lord Coke after his diſgrace at court had given him leiſure for cool reflection, was of opinion that the ſtatutes of *Edw.* 6. touching evidence are not repealed by the 1 and 2 *Phil. and Mary*; that two witneſſes are ſtill required in caſes of treaſon, not barely upon the indictment, which he ſtateth as an opinion entertained by ſome, but alſo upon the trial. This, ſays *Foſter*, as far as I can collect from the paſſages I have cited, was the reſult of all his ſearches in this matter; though he doth not in every part of the paſſages expreſs himſelf with that light and preciſion which the importance of the ſubject required. *Foſt.* 235. *Vide* 3 *Inſt. from* 24 *to* 27. *Ante Mr. Love's caſe, p.*

Rule

Rule the Seventh.

One witneſs to one, and another witneſs to another overt-act of the very ſame treaſon, are ſufficient within the ſtatutes of the 1 *and* 5 *and* 6 *of Edw.* 6. and the expreſs words of 7 *Will.* 3. are agreeable hereto. 2 *Hawk. P. C. ca.* 25.

And ſo it was ruled in lord STAFFORD's caſe, 32 *Car.* 2. before the lords, on an impeachment by the commons of high treaſon, for hiring a perſon to kill the king. *Dugdale* ſwore that the priſoner proffered him five hundred pounds to perpetrate the fact; and *Dates* ſwore that the priſoner received a commiſſion to be paymaſter to an army to be raiſed by the roman catholics; and *Tubberville* ſwore, that five or ſix years before that time, the priſoner, at Paris, proffered him a good reward to kill the king.

Upon this evidence a queſtion was put to the judges there attending (SCRAGGS, C. J. abſent) whether the evidence given was ſufficient for convicting the priſoner, notwithſtanding the ſtats. of 1 *Edw.* 6. *ca.* 12. and 6 *Edw.* 6. *ca.* 11. which require two witneſſes for convicting a traitor, and here is but one witneſs to each fact?

The JUDGES anſwered, when the priſoner is charged with the offence of killing the king, and that the evidence is, that he at ſeveral times laboured it, and by ſeveral ways, and to each particular time and fact there is but one witneſs, and yet every of the ſaid facts conduces directly to the effecting and perpetration of the fact and treaſon charged upon the priſoner, ſuch evidence is ſufficient within the ſtatutes.—

But otherwiſe it had been, if the facts (given in evidence) had been tending to another ſeveral treaſon.

And the reaſon given why ſuch evidence was good was, becauſe otherwiſe it would be a moſt difficult thing, and almoſt impoſſible to convict any one of high-treaſon for compaſſing the death of the king, for ſuch compaſſings are ſeldom acted in the preſence of two witneſſes at one time preſent.

On this occaſion the CHANCELLOR ſaid, that antiently moſt of the judges were churchmen, and by the canon law none can be condemned for hereſy but on evidence of two lawful and credible witneſſes, and bare words may make a heretick, but not a traitor, and antiently hereſy was treaſon: and from thence the parliament thought fit to appoint that two witneſſes ought to be for proof of high treaſon. *Sir Thos. Raym.* 407. 3 *St. Tr.* 101. 2 *Hale P. C.* 286.

FOSTER obſerving on this determination in lord STAFFORD's caſe, ſays, from that time the point hath been ſettled. And in the ſucceeding trials of that reign and the next, though many irregular things were done favourable to the times, this rule ſtill kept its ground. And in all the trials after the revolution, before the act of the 7 *Will.* 3. took place, it was ſtrictly obſerved. *Foſter* 237. 4 *St. Tr.* 691, 697. *Rookwood's caſe*, 8 *Will.* 3. 5 *St. Tr.* 22. *Vaughan's caſe*, 8 *Will.* 3.

FOSTER alſo lays it down as a general rule, that all collateral facts, not conducing to the proof of the overt-acts, may be given in evidence on a trial for high treaſon—for whatever was evidence at common law is ſtill good evidence under the ſtatute, which is confined to the proof of the overt-acts. *Foſter* 242. 2 *Salk.* 634. *Vaughan's caſe.* 5 *St. Tr.* 17.

Or by the confeſſion of the priſoner, for the words of the ſtatute are confined to the overt-acts. 8 *St. Tr.* 255. *Foſter* 242. *Vide Confeſſion, Poſt.*

Rule the Eighth.

The ſtatute the 1 *and* 2 *Phil. and Mary, ca.* 10. by enacting, "That all trials of treaſon ſhall from hence-"forth be according to the courſe of the common law," doth not take away the neceſſity of two witneſſes upon an indictment required by the 1, 5 *and* 6 *Edw.* 6. *c.* 6. becauſe the indictment is no part of the trial, but is more properly the accuſation to be tried. 2 *Hawk. P. C. ca.* 25. *S. P. C.* 90, 164. *B. Cor.* 220.

FOSTER on this ſubject ſaith, a difference hath been taken in the conſtruction of the ſtatutes of *Edw.* 6. and *Phil.*

Phil. and Mary, between the indictment and the trial; but this diſtinction is entirely without foundation, even upon the foot of thoſe ſtatutes. But the preſent act hath not left room for that diſtinction. It enacteth, "That no "perſon ſhall be *indicted*, tried, or attainted of high "treaſon, whereby any corruption of blood may be "made to the offender, or his heirs, or of miſpriſion "of ſuch treaſon, but upon the oaths of two lawful "witneſſes, either both to the ſame overt-act, or one of "them to one, and the other of them to another overt-"act of the SAME TREASON, unleſs he ſhall willingly, "without violence, in OPEN COURT, confeſs the ſame, "or ſhall ſtand mute, or refuſe to plead, or in caſes of "high treaſon ſhall peremptorily challenge above the "number of thirty-five of the jury." 7 *Will.* 3. *ca.* 3, *ſect.* 2.

The caſe of ſir JOHN FENWICK, 1696, 8 *Will.* 3. ſhews the reſtriction in the above clauſe of ſtatute the 7 *Will.* 3. on the Engliſh courts of juſtice to be imperative. In that caſe it was ruled, that the information of a witneſs taken upon oath, before a juſtice of peace, being joined with the evidence of one other witneſs only, could not in the ordinary courts of juſtice amount to a ſufficient evidence within the above ſtatute, which requires two witneſſes in high treaſon, and therefore it was thought neceſſary to proceed in that caſe by bill of attainder in parliament; whoſe power, ſays *Hawkins*, excuſing the proceedings, can be reſtrained by no rules but thoſe of natural juſtice. 5 *St. Tr.* 40, *Hawk. P. C. ca.* 46.

And in the proceeding on this bill, by the influence of the court, within one year after the paſſing of a ſtatute, enacted, as BLACKSTONE ſays, for the purpoſe "of ſecuring the ſubject from fictitious conſpiracies, the engines of profligate and crafty politicians," by requiring a double teſtimony to convict; a majority of the repreſentatives of the people of England eſtabliſhed a precedent, diſpenſing with rules of evidence, which they had recently eſtabliſhed as law. A proceeding the more extraordinary, when it is remembered that at the revolution, 1698, king WILLIAM in his declaration to the people ſtated,

ſtated, that "OPPRESSION ON TRIALS" was one cauſe of his coming into England. *Vide the declaration.*

It is alſo provided by the above ſtatute, "that any "perſon being indicted as aforeſaid, for any of the ſaid "treaſons or miſpriſions, may be outlawed and thereby "attainted. And in the caſes of the high treaſons "aforeſaid, where, by the law, after ſuch outlawry, the "party outlawed may come in and be tried, he ſhall "upon ſuch trial have the benefit of this act." *Sect.* 3.

And it farther enacteth and declareth, "That if two "or more diſtinct treaſons of divers heads or kinds "ſhall be alledged in one bill of indictment, one wit-"neſs to one of the ſaid treaſons, and another to ano-"ther of the ſaid treaſons, ſhall *not* be deemed two "witneſſes to the ſame treaſon, within the meaning of "the act." *Sec.* 4.

Rule the Ninth.

The ſaid ſtatute of the 1 *and* 2 *Phil. and Mary* doth not extend to miſpriſion of treaſon. But this is expreſsly provided for by ſtatute 17 *Will.* 3. as to ſuch treaſons as are within that ſtatute, and therefore there muſt be two witneſſes to the indictment as well as to the trial of ſuch miſpriſion. 2 *Hawk. P. C. ca.* 25. *Vide the ſtat. Will.* 3. *immediately above cited.*

Rule the Tenth.

That petit treaſon is within *ſtat.* 4, 5 *and* 6 *Edw.* 6. and 1 *and* 2 *Phil. and Mary, c.* 10. but not within the 7 *Will.* 3.

From whence it follows, that two witneſſes are required to the indictment, and not to the trial of that offence, and that two witneſſes are not neceſſary even upon the indictment, if the party upon his examination confeſs it. 2 *Hawk. P. C. ca.* 25. *B. Cor.* 220. 3 *Inſt.* 24. *Foſt.* 233.

Rule the Eleventh.

The ſtatute of the 1 *Phil. and Mary, c.* 11. which enacts, "That all perſons accuſed of any offences concerning the impairing, counterfeiting, or forging the coin, ſhall be indicted and tried as at the common law," hath been conſtrued to extend to clipping, and all other offences in impairing the coin, which have been made treaſon ſince the ſaid *ſtat.* 1 *and* 2 *Phil. and Mary.*

From whence it may be argued, that *ſtat.* 7 *Will.* 3. by "expreſsly providing, that nothing therein ſhall extend to high treaſon for counterfeiting the coin," intended in like manner, that it ſhould not extend to any other high treaſon concerning the coin. 2 *Hawk. P. C. c.* 25. 2 *Jones* 233. 3 *Keb.* 68.

From the authorities cited, two rules clearly reſult—

Rule the Twelfth.

Firſt, That the common law did not require *any certain* number of witneſſes, on the trial of any crime whatſoever. 2 *Hawk. P. C. ca.* 46.

Rule the Thirteenth.

Secondly, That *ſtats.* 1 *Edw.* 6. *ca.* 12. *and* 5 *and* 6 *Edw.* 6. *ca.* 11. which required two witneſſes in treaſon, were not repealed by *ſtat.* 1 *and* 2 *Phil. and Mary*, which ordered that all trials for treaſon ſhould be according to the courſe of the common law; and therefore that it is ſtill neceſſary in all trials for high treaſon, not concerning the coin, to have either two witneſſes to the ſame overt-act, or one witneſs to one, and another witneſs to another overt-act of the ſame kind of treaſon. 2 *Hawk. P. C. ca.* 46.

On the authority of the firſt of the rules, and in as much as the ſtatutes of *Edward* the ſixth, *Philip* and *Mary*, and *William* the third, never were enacted in Ireland, the judges, ſo far as related to the number of witneſſes, proceeded on the trial of the reverend WILLIAM JACKSON, *at Bar, B. R. Dublin, Eaſter*, 1795; and alſo on the ſeveral

ſeveral ſubſequent trials for the ſame offence, by *commiſſioners of oyer and terminer, Dublin, December* 1795, *February* 1796, *&c.*

Curran, *Ponſonby* and *Mac Nally*, aſſigned counſel on thoſe trials for the priſoners, revived and urged the doctrine of ſir EDWARD COKE, that two witneſſes, credible in their perſons, and concurrent in ſupporting the allegation of one integral and ſubſtantive claſs of treaſon, were neceſſary at common law to convict of high treaſon, notwithſtanding the obiter opinion of ſir MICHAEL FOSTER. That the ſtatutes of *Edw. 6. and Will.* 3. though not enacted in Ireland, were declaratory of a great principle of juſtice, and the common law of the land. That theſe ſtatutes did not create, but revived that principle which had only ſlept, but never expired; and, that by the revival an end was put to an innovating abuſe of the common law, the antient rule of which was, that no man could be lawfully indicted or convicted of high treaſon, but on the teſtimony of two lawful witneſſes, unleſs he confeſſed the fact.

The *attorney-general (Wolfe)* anſwered, and lord CLONMELL, C. J. DOWNES and CHAMBERLAIN, J. ruled, that the common law of England and Ireland were the ſame; and by that law one credible witneſs ſwearing to the fact laid, and thoſe facts being the acts of the priſoner, and manifeſting his treaſonable intention, was ſufficient to convict, in caſes of high treaſon, if the jury believed that witneſs; and that the ſtat. of king *William* the third, which require two witneſſes, was confined to England, and not of effect in Ireland. *Vide Jackſon's trial by Ridgeway.*

Every man who has read the parliamentary hiſtory of that æra, when the liberties of Ireland were claimed, when *Poyning*'s law was repealed, and when the appellant juriſdiction of the lords was re-eſtabliſhed, and the freedom of the ſubject fortified by the *habeas corpus* act, muſt wonder that the men who brought about the reformation of Ireland, did not alſo procure the paſſing of a ſtatute ſimilar to that of the 7 *of Will.* 3. in England. But probably that act was conſidered by the Iriſh legiſlators of that day, as declaratory of an antient principle of

of common law. They did not recollect to adopt the language of *Curran*, in *Jackſon*'s caſe, "That the breath "which in England cannot ſo much as taint the cha- "racter of the accuſed, ſhall, becauſe he is in Ireland, "blow him from the face of the earth. That he who "would in Great-Britain be ſecure from an individual "enemy, muſt, becauſe he is to be tried in Ireland, "periſh under his ſingle accuſation." Yet ſuch is the diſtinction in the law of treaſon, between the two countries. But now that a political union has incorporated them into one kingdom, governed by one parliament, the law reſpecting evidence on trials for high treaſon, will, no doubt, be made common to all the king's ſubjects, by extending the ſtatutes of *Edward* the *ſixth*, *Philip* and *Mary*, and *William* the *third*, to thoſe who are reſident in Ireland. Clearly the ſubjects of the united kingdom, reſident in Ireland, are intitled to every protection enjoyed by thoſe who reſide in England. The law which takes away the life of a man, ſhould ever be wiſe, and ſhould ever be uniform. Diſtinctions ſuch as ſtill exiſt in the law of treaſons, are invidious and tend to diſcontent. If theſe Engliſh ſtatutes were enacted becauſe in caſes of treaſon the oath of allegiance counterpoiſes the information of a ſingle witneſs, is not an Iriſhman intitled to the benefit of that reaſon?—or, if the principal reaſon for enacting thoſe ſtatutes was, as ſir WILLIAM BLACKSTONE ſtates, "To ſecure the ſub- "ject from being ſacrificed to fictitious conſpiracies, "which have been engines of profligate and crafty po- "liticians in all ages," why ſhould not Iriſhmen be granted the ſame ſecurity, from ſuch conſpiracies and the machinations of ſuch politicians? The imperial parliament have to diſcuſs and determine thoſe queſtions at a future day. *Vide Blackſt. Comm.* 351.

Biſhop BURNET makes a ſerious objection to the *ſtat.* 7 *Will.* 3. and his principles appear ſtrongly urged in the caſe of ſir *John Fenwick*, by thoſe who ſupported the bill of attainder. The biſhop ſays, "This act paſſed "after a long ſtruggle, contrary to the hopes and ex- "pectations of the perſons then at the head of affairs," it was carried by the tories, and "the deſign of it

" ſeemed to be, to make men as ſafe in all treaſonable " conſpiracies and practices, as was poſſible." *Burnet's Hiſt. his own Time.* 3 *edit. Lond.* 1766. *p.* 194, 222.

On this opinion ſir MICHAEL FOSTER critically obſerves, that had the bill required two witneſſes to the ſame fact, at the ſame time, as his lordſhip ſaid it did, it would indeed have rendered men very ſecure in treaſonable practices; but then it will be difficult to reconcile this to what the biſhop ſaith in a few lines afterwards. For, after ſetting forth the ſubſtance of ſome of the principal clauſes, particularly that relating to two witneſſes to the ſame fact, at the ſame time he addeth—" all theſe things were in *themſelves juſt*, and if " they had been moved by *other men*, and at *another time* " they would have met with *little oppoſition.*"

So that it appears the biſhop's objection was not to the *principle* of the bill, but to the *authors* of the bill and their party.

Rule the Fourteenth.

It is a ſettled general rule, that whatever was evidence at common law, is ſtill good evidence under the ſtatute the 7 *of Will.* 3.

It appears by this rule that it is ſtill neceſſary, in all caſes of high treaſon not concerning the coin, to have either two witneſſes to the ſame overt-act, or one witneſs to one overt-act, and another witneſs to another overt-act of the ſame treaſon; this point is now finally ſettled, it being enacted, that no evidence ſhall be admitted of any overt-act that is not expreſsly laid in the indictment, by *ſtat.* 7 *Will.* 3. *ca.* 3. *ſec.* 2. 4.

FOSTER commenting on this ſtatute of king *William*, ſays, but though it requireth two witneſſes to each treaſon, yet a collateral fact not tending to the proof of the overt-acts may be proved by *one*. For this ſtatute confineth itſelf to the proof of the treaſon, THE PROOF OF THE OVERT ACTS. And the *ſtatutes of Edw.* 6. are confined to the evidence for proving the priſoner guilty of the offences charged on him, which likewiſe muſt be underſtood of overt-acts. *Foſt.* 240.

In

In the KING, *v.* VAUGHAN, *admiralty ſeſſions, November* 1696, 8 *Will.* 3. the difference between the proof of the overt-acts and of collateral facts, was taken by lord HOLT, C. J. the priſoner inſiſted and called witneſſes to prove he was a ſubject of *France*, born in the dominions of the *French* king. The counſel for the crown called witneſſes to prove him born in Ireland; and his counſel inſiſting that there was but one credible witneſs to that fact, HOLT, C. J. ſaid, "That is no overt-"act, if there be one witneſs to that it is enough; "there need not be two witneſſes to prove him a ſub-"ject, but here be more." 5 *St. Tr. Sack.* 634. *S. C. Vide ca. Conf. Poſt.*

The KING, *v.* WILLIS, *admiralty ſeſſions*, 7 *Ann.* confirms the opinion of HOLT. He was indicted for adhering to the queen's enemies on the high ſeas. He made alienage his defence as *Vaughan* had done, and his confeſſion that he was an Engliſhman was admitted, though his counſel inſiſted on the *ſtat.* 7 *Will.* 3. It was anſwered by the court, that the 7 *Will.* 3. was to prevent a confeſſion from being *concluſive* evidence of the *very overt-act*, not to take away that ſort of evidence of collateral matters. And *Vaughan*'s caſe was relied on. *Foſt.* 242. *Vide chap. Confeſſion poſt.*

Sir MICHAEL FOSTER accedes to theſe deciſions, obſerving, that in truth with regard to all collateral facts, not conducing to the proof of the overt-acts, we may ſafely lay it down as a general rule, that whatever was evidence at common law, is ſtill good evidence under the ſtatute, which is confined to the proof of the overt-acts. *Foſt.* 242.

Rule the Fifteenth.

In all caſes of high treaſon to which corruption of blood is not attached, the evidence of a ſingle credible witneſs is ſufficient to convict.

And ſo it was determined in the caſe of GAHAGAN, CONNOR, and MAPHAN, *Old Bailey ſeſſions, January* 1748, before PARKER, C. B. and BURNETT, J. The priſoners were indicted for high treaſon, in filing and diminiſhing

the current coin of the realm. One witneſs only was produced to prove the fact: and it was ſubmitted to the court, whether upon the conſtruction of *ſtat.* 1 *Edw.* 6. *ca.* 12. 6 *Edw.* 6. *ca.* 11. 1 *and* 2 *Phil. and Mary, ca.* 10. *and* 7 *Will.* 3. *ca.* 3. *ſect.* 2. any perſon can be convicted of high treaſon upon the teſtimony of a ſingle witneſs. And,

The court upon the authority of *Anſtruther*'s caſe, and the opinion of RAYMOND, C. J. *Old Bailey, October ſeſſions,* 1727, as the caſe of *Ann Johnſon,* held that *one* witneſs is ſufficient to prove any treaſon, where there is no corruption of blood. *Leach. Cr. ca.* 2. *Edit.* 39. 3 *Edit.* 50.

In the KING, *v.* ANSTRUTHER, indicted on *ſtat.* 5 *Eliz. ca.* 12. for impairing the coin, cited in the above caſe, the priſoner was convicted on the evidence of one witneſs: and at a meeting of the judges at Serjeant's-Inn-hall, 6 *May* 1725, they were unanimous that the conviction was legal. *T. Jones* 233.

Here it is proper to obſerve, that by the general tenor of the act of 7 *Will.* 3. it extendeth to ſuch high treaſons *only,* whereby "any corruption of blood may or "ſhall be made to the offender or his heirs, and to the "miſpriſion of ſuch treaſons. *Foſt. Cr. Law* 222.

The firſt and ſecond ſections are expreſsly confined to thoſe treaſons, and the miſpriſions of them: and all other clauſes, except thoſe relating to the trial of peers, and to the rejection of evidence of overt-acts not laid in the indictment, uſe words of plain reference to the treaſons mentioned in the firſt and ſecond ſections. And the thirteenth ſection expreſsly excludeth the treaſons of counterfeiting his majeſty's coin, the great ſeal, privy ſeal, ſignet and ſign manual. *Ibid.*

The caſe of *petit treaſon* therefore ſtandeth upon the foot it did before this act, and ſo do the treaſons that are expreſsly excluded. And all the treaſons created by acts ſaving the corruption of blood. *Ibid.*

The ſtatutes ſaving the blood are, 5 *Eliz. ca.* 1. *ſec.* 10, 11, 12. concerning the papal ſupremacy. 5 *Eliz. ca.* 11. 18 *Eliz. ca.* 1. 8 *and* 9 *Will.* 3. *ca.* 25. *and* 15 *and* 16 *Geo.* 2. *ca.* 28. *touching the coin.*

Rule

Rule the Sixteenth.

Two witneſſes are required in proof of perjury: but the taking of the oath and the fact may be proved by one witneſs only.

In the QUEEN, *v.* MUSCOT, *Mich.* 12 *Ann. B. R.* this rule is laid down by PARKER, C. J. who, in ſumming up the evidence to the jury, among other things ſaid: there is this difference between a proſecution for perjury and a bare conteſt about property, that in the latter caſe the matter ſtands indifferent, and therefore a credible and probable evidence ſhall ſum the ſcale in favour of either party: but in the former, preſumption is ever to be made in favour of innocence, and the oath of the party will have a regard paid to it until diſproved. But it muſt be a clear and ſtrong evidence, and more numerous than the evidence given for the defendant, for elſe only oath againſt oath. 10 *Mod.* 195.

For the rule reſpecting the competency of the party prejudiced by the perjury to prove the offence. *Vide* 4 *Burr.* 2254. *Abraham's qui tam, v. Bunn. Poſt*

CHAPTER VI.

In what caſes, and under what circumſtances the confeſſion of a priſoner may be given in evidence, by authority of the common law, and by ſtatute; and, in what caſes the confeſſion of a priſoner is to be rejected, and of evidence by the confeſſion of perſons not on trial.

Rule the First.

THE confeſſion of the defendant himſelf, taken upon an examination, in writing, before juſtices of the peace, in purſuance of the ſtatutes of *Philip and Mary*, upon bailment or commitment for felony, is legal evidence againſt the party confeſſing. 2 *Hawk. P. C. ca.* 46. *Summ.* 102, 193, 262, 264.

But

But such confession ought not to be exhibited to the grand jury. *Gilb. Evid. by Loft.* 216.

The words of the statute are: "That every justice, "or justices of the peace, before whom any person "shall be brought, for manslaughter or felony, or for "suspicion thereof, shall, before he or they shall com- "mit or send such prisoner to ward, take the examina- "tion of such prisoner, and the information of those "who bring him, of the facts and circumstances thereof, "and the same, or as much thereof, as shall be mate- "rial to prove the felony, shall be put into writing "within two days after such examination, and the same "shall certify in such manner and form, and at such "time as they shall and ought to do, if such prisoner "so committed, or sent to ward, had been bailed or let "to main-prize. *St.* 2 *and* 3 *Phil. and Mar. ca.* 10. *Irish* 10 *Car.* 1. *ca.* 18. 2 *Stat. at large* 76.

Rule the Second.

But it does not appear necessary that the magistrate acting judicially under the directions of the above statute, need, in order to make the written confession evidence, warn the prisoner of its effects against him on trial, or procure his signature to it in writing.

And the reason is clear, for he "Need not put it into "writing for two days after he takes it." *Vide stat.*

And therefore in the KING, *v.* MAGILL, *Trim. Summer assizes*, 1799, CHAMBERLAIN, J. B. R. *Ireland*, admitted in evidence, on an indictment for felony, the confession of the prisoner, taken by a justice of the peace, in an examination in writing, though it appeared, on the justices admission, that he had not warned the prisoner of the legal consequences of his making such confession. *MS. note.*

And in the KING, *v.* LAMB, *Croyden, Summer assizes*, 1791, before WILSON, J. It was determined, that if a prisoner be taken before a magistrate on a charge of felony, and on his examination makes a voluntary confession, which the magistrate reduces into writing, and afterwards reads it over to the prisoner, who answers, "it

" *it is all true enough*," but refuſes to ſign it, ſuch written confeſſion may be read in evidence, though not ſigned either by the priſoner or by the juſtice: for a confeſſion under ſuch circumſtances is admiſſible at common law, and the ſtatutes of *Philip and Mary*, make no alteration whatever reſpecting the admiſſibility of evidence. *MS.*

And in LAYER's caſe, *Mich.* 9 *Geo.* 1. B. R. indicted for high treaſon, the priſoner's confeſſion taken down before the privy council, but not ſigned by him, was admitted in evidence; that is, the court ſaid the confeſſion was admiſſible, as a corroborating circumſtance of the evidence previouſly given. 8 *Mod.* 89. *Vide Poſt.*

Rule the Third.

The confeſſion of the defendant himſelf, taken by the common law, or an examination before a ſecretary of ſtate, or other magiſtrate, for treaſon, or other crimes, not within the *ſtat. of Phil. and Mary*, may likewiſe be given in evidence againſt the party confeſſing. 2 *Hawk. P. C. ca.* 46.

As in the KING, *v.* THONG, PHILIPS, STUBBS, and others, indicted for treaſon, *Newgate ſeſſions*, *December*, 14 *Car.* 2. all the judges agreed, that ſuch a confeſſion upon an examination before a privy counſellor, though he be not a juſtice of peace, is a confeſſion within the meaning of the ſtatute. And the lord BRIDGEMAN ſaid, becauſe juſtices of the peace were not enabled to take examinations before the 1 *and* 2 *of Phil. and Mary*, *ca.* 13. *Kelyng* 18, 19.

So in the KING, *v.* PAINE, *at Bar*, *Hil.* 7 *Will.* 3. on an indictment for publiſhing a libel. There being no proof that the defendant was the compoſer of the libel, or that he wrote it, except by his own confeſſion, before the mayor of Briſtol, his confeſſion was given in evidence againſt him, under this rule, that if ſuch confeſſion ſhall be taken as evidence to convict him, it is but juſtice and reaſon, and ſo allowed in the civil law, that his whole confeſſion ſhall be evidence as well for him as againſt

againſt him. 5 *Mod.* 165. This was refuſed in *Throckmorton's* caſe. 1 *Mary.* 1 *St. Tr.* 70.

Rule the Fourth.

The confeſſion of the defendant himſelf in diſcourſe with private perſons, or before a magiſtrate, if not taken in writing, hath always been received as evidence againſt him. 2 *Hawk. P. C. ca.* 46.

As in STONE's caſe, *Trinity*, 4 *Eliz.* The priſoner, who was indicted for murder, was convicted on his own confeſſion to two priſoners, confined with him in Newgate. *Dyer* 214. *c.* 215. *a. Francis's caſe.* 6 *St. Tr.* 58.

And in HALL's caſe, *Lent aſſizes, Stafford* 1790, it was held, that if a confeſſion be not taken in writing, parol evidence of ſuch confeſſion is legal evidence, and a priſoner may be convicted thereon, although the facts be totally uncorroborated. *MS.*

Rule the Fifth.

The confeſſion of one perſon cannot be received as evidence againſt others. 2 *Hawk. P. C. ca.* 46.

Yet in THROCKMORTON's caſe, *Guildhall, London*, 1 *Mar.* 1554, the duke of SUFFOLK's confeſſion was read againſt him, imputing that he had been privy to the treaſonable conſpiracy, for which the duke had been executed. 1 *St. Tr.* 70.

So in the earl of ESSEX's caſe, for high treaſon, before the LORDS, at *Weſtminſter*, 19 *February* 1600. 43 *Eliz.* the confeſſion of ſir *Ferdinando Gorges*, and ſir *Charles Davers*, were read in evidence againſt the priſoner. 1 *St. Tr.* 197.

And in ſir WALTER RALEIGH's caſe, tried for high treaſon, at *Winton, by ſpecial commiſſion*, 1 *James* 1. *November* 1603, before POPHAM, C. J. B. R. ANDERSON, C. J. Com. Pl. and GAWDRY and WARBURTON, J's. The attorney-general, ſir EDWARD COKE, who conducted the proſecution for the crown, cauſed the confeſſion of lord *Cobham* to be read in evidence againſt ſir *Walter*—but on this occaſion, as the priſoner obſerved,

Mr.

Mr. attorney neither behaved "like a man of quality, "nor a man of virtue," and whoever reads the trial will add, nor like a lawyer, for clearly lord *Cobham's* confeſſion was not legal evidence, and ſir *Edward Coke's* language to the priſoner was unprovoked, yet mean, cruel, and vulgar. The humanity of lords ELDEN and KILWARDEN, who acted as attornies-general, in Great-Britain and Ireland, on the recent trials for treaſon, exhibits a contraſt of conduct and manners that muſt do them honour with the lateſt poſterity. Thoſe reſpectable and learned advocates, like honorable men, drew their expoſitions of the law from pure principles, and legal information; principles which are found in the works of *Hale*, whoſe memory will live throughout the enlightened world, as long as the adminiſtration of pure juſtice ſhall exiſt; and of *Foſter*, whoſe judicial character merits the higheſt eulogium; principles which no expediency can warp, and which no power can abuſe with impunity.

Rule the Sixth.

The confeſſion of a priſoner, taken on examinations by a magiſtrate on an information, and reduced into writing, cannot be given in evidence until its identity be proved. 1 *Hale P. C.* 284.

Rule the Seventh.

And on the principle, that "the beſt evidence the na- "ture of the caſe afford," is the only evidence that can be received, the proof of ſuch examinations of the priſoner muſt be made either by the juſtice of the peace, or the coroner who took them, or the clerk who wrote them down, that they are the true ſubſtance of what the priſoner confeſſed. *Ibid.*

Rule the Eighth.

And before ſuch examinations can be read in evidence, it muſt alſo be teſtified, that they were made freely,

without any menace or terror, or any ſpecies of undue influence impoſed upon the priſoner. *Hale P. C.* 284.

HALE gives the reaſon—"I have often known," ſays that venerable and benevolent judge, "the priſoner diſown his confeſſion upon his examination before the juſtice, and be ſometimes acquitted againſt ſuch his confeſſion." *Ibid.*

Rule the Ninth.

But a free and voluntary confeſſion is deſerving of the higheſt credit, becauſe it is preſumed to flow from the higheſt ſenſe of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confeſſion forced from the mind by the flattery of hope or the torture of fear, comes in ſo queſtionable a ſhape, when it is conſidered as evidence of guilt, that no credit ought to be given to it, and therefore it is rejected. *Warrickſhall's caſe, Leach. Cr. ca.* 2 *Ed.* 222. 3 *Edit.* 298.

Therefore in THOMAS VAUGHAN's caſe, before the *admiralty ſeſſions, November* 1696, 8 *Will.* 3. though his confeſſion was given in evidence, yet it appearing, upon croſs examination, to have been made the night he was taken, and when very drunk, the fact of his birth in Ireland being abſolutely denied by him the next morning upon his examination taken before a magiſtrate, little regard ſeems to have been paid to his confeſſion. 5 *St. Tr.* 17. 2 *Salk.* 634. *Foſter* 240.

Theſe rules reflect the brighteſt luſtre on the principles of the Engliſh law, which benignly conſiders, that the human mind, under the preſſure of calamity, is eaſily ſeduced, and liable in the alarm of danger, to acknowledge indiſcriminately a falſehood or a truth, as different agitations may prevail: and therefore a confeſſion, whether made upon an official examination, or in diſcourſe with private perſons, which is obtained from a defendant by the impreſſion of hope or fear, however ſlight the emotion may be implanted, is not admiſſible evidence. For the law will not ſuffer a priſoner to be made

made the deluded inſtrument of his own conviction. *Gilb. Evid. by Loft*, 137.

The wiſdom of this doctrine was fully illuſtrated in a caſe at *Glouceſter*. Three men were tried for the murder of Mr. *Harriſon*, at *Cambden*, and one of them, under a promiſe of pardon, confeſſed himſelf guilty of the fact. The confeſſion therefore was not given againſt him, and a few years after it appeared that *Harriſon* was alive. *MS. note cited in Leach's Cr. Ca.* 2 *Edit.* 223. 3 *Edit.* 298.

The ſame rule and the ſame merciful conſtruction thereon prevailed in Ireland. In *Spring aſſizes*, *Mullingar*, *April* 1800, WILLIAM BELL was tried on an indictment for robbing the mail. On being apprehended, Mr. *Tighe*, his maſter, and alſo a magiſtrate, obtained a confeſſion from him by menaces and promiſes. Mr. *Lill*, alſo a magiſtrate, went to the priſoner in gaol, where he ſigned a written confeſſion. Mr. *Lill*, on the trial, candidly acknowledged that he believed the written confeſſion, taken from the priſoner by him, was given in conſequence of the impreſſions previouſly made on the priſoner's mind by Mr. *Tighe*, and therefore lords KILWARDIN and CARLETON, Chief Juſtices, refuſed to receive it. *MS.*

Mr. CAPEL LOFT, the learned editor and amplifier of the laſt edition of "GILBERT's Law of Evidence," in his reading upon the authorities cited from HALE, gives a caution worthy the attention of the minor magiſtrates. It appears therefore, ſays Mr. LOFT, that if any of the requiſite circumſtances are wanting, this ſpecies of proof (CONFESSION) will be rejected; and on the laſt circuit, ſir GEORGE NARES even went further, he, though ſinking under his illneſs, exerted his accuſtomed vigilance and benevolence, in the caſe where the admiſſibility of a confeſſion in writing was rendered doubtful, by circumſtances at the time of making it. If practicable, it may ſeem always beſt where the confeſſion of the priſoner is taken, that it be in the preſence of one or more indifferent perſons unconnected with the *proſecutor*, the *magiſtrate*, or the *priſoner*, or at leaſt the two former,

that it may be proveable to have been deliberately and freely made. *Loft in his ed. of Gilb. Evid.* 216.

It is ſcarcely poſſible for any man who has attended the courts of juſtice in Ireland, not to recollect, on reading the above eulogium on ſir WILLIAM NARES, the truly conſtitutional and uniformly humane conduct of Mr. KELLY, while the bench was honoured by his filling a judicial ſeat upon it.

The truth of this reaſon given by HALE and the other authorities above cited, was repeatedly evinced upon trials on the circuits for treaſon, for adminiſtering unlawful oaths, and for other offences, connected with the rebellion in Ireland, in 1798. And experience, reſulting from thoſe trials, inconteſtibly proves, that confeſſions extorted from the fear of death, the infliction of torture, the hope of reward, or impunity for offences committed, ſo far from accelerating and clearing, impedes and fouls the current of juſtice, by often cauſing the acquittal, not only of the accuſer by confeſſion, but of thoſe whom he accuſes in the firſt inſtance before the magiſtrate, to ſave himſelf. A witneſs ſo circumſtanced, when he appears to give evidence for the crown, often denies what he has ſworn as an informer before the juſtice, or makes ſuch excuſes for ſwearing, or prevaricates, or conducts himſelf in ſuch a queſtionable manner, as to deſtroy his credit with the jury. If he has ſworn falſely before the magiſtrate, under the impreſſion of terror, or hope of pardon, it has frequently happened, that the ſolemnity of the court, and the appearance of the priſoner whom he has injured, awes his mind into a recantation of his confeſſion and extracts the truth. He feels himſelf on the verge of committing murder—and the accuſations of his conſcience palſying his heart, renders him a coward in villainy. Witneſſes, however, who have ſworn truly in their examinations before the magiſtrate, and falſely before the jury, have in ſeveral inſtances become the dupes of their own wickedneſs. For, though the priſoner has been acquitted by the falſe ſwearing of the witneſs, the witneſs has been afterwards put on his trial, convicted and hanged, or tranſported,

tranſported, or ſentenced to the penalties annexed to the crime of perjury.

Rule the Tenth.

It has been determined, that where the accuſed makes a confeſſion in converſation, and afterwards makes another confeſſion before a magiſtrate, acting judicially, by taking down the ſame in writing, the converſation or parol confeſſion may be given in evidence.

As in the KING, *v.* CARTY, at a *commiſſion of Oyer and Terminer, &c. Dublin, October* 1797, 37 *Geo.* 3.

The priſoner was tried before BOYD and DOWNES, juſtices, B. R. on an indictment on *ſtatute (Iriſh)* 36 *Geo.* 3. *ca.* 27. for that he with ſeveral others named, "Did "conſpire, confederate, and agree together, &c. wil- "fully, felonioufly, and of their malice prepenſed, to "kill and murder HENRY LAWES LUTTRELL, earl of "CARHAMPTON."

Mac Nally, of counſel for the priſoner, objected to receiving parol evidence of a private converſation between earl *Carhampton*, the proſecutor, and the priſoner, after he was committed to gaol. The objection was founded on this material fact, that a declaration or confeſſion of the priſoner, had been taken as an examination in writing by a magiſtrate, and that being evidence of a higher nature than a confeſſion by parol, and being the beſt evidence the nature of the caſe admitted of, was the only evidence could be given.

Lord *Carhampton* anſwered, he could poſitively ſwear that there was no certain information given by the priſoner, or even in contemplation, at the time of the converſation he was about to give in evidence.

The *counſel* replied, that if a confeſſion or examination of the priſoner reſpecting the offence charged upon him and then in iſſue, was at any time taken down in writing by a magiſtrate, parol teſtimony could not be legally received; for ſuch evidence ſolemnly written and judicially taken, was, if returned by the magiſtrate, of authority next to the records of the court, and excluded parol evidence of the priſoner's acknowledgments altogether;

altogether; and if thoſe examinations were not returned, then the law implied that they were kept back, becauſe, if produced, they would ſerve the priſoner.

Lord *Carhampton* was then examined by the *attorney-general* to the particular points which gave riſe to the objection, and in his anſwers ſtated, that he knew an information or confeſſion in writing had been made or given by the priſoner, upon the ſubject matter then examining into,—that it was not taken by him, but given before a magiſtrate in his preſence, about a fortnight after the priſoner was committed—and he believed it was in exiſtence; but, the converſation he had with the priſoner, happened about a fortnight previous to the taking of the written information or confeſſion.

The *counſel* perſevered in his objection, which he urged was this—It was now in evidence that there had been a converſation between the priſoner and the proſecutor, reſpecting the charge now before the court. Subſequent to this there was a confeſſion in writing by the priſoner, or an examination taken by the magiſtrate, purſuant to the ſtatute of *Charles* 1. *ca.* 10. acting in his judicial ſituation, and by him taken down in writing, in the preſence of lord *Carhampton*. Lord *Carhampton* had heard all that was communicated by parol, and offered evidence from memory, ſuch evidence might err—written evidence could not; and therefore it was the only proper evidence of confeſſion, proper to be brought forward in the caſe.

Downs, J. The objection is ſimply this—lord *Carhampton*'s evidence is offered to prove a fact happening upon a particular day, namely, a converſation with the priſoner. Then, the objection is, that ſomething happened afterwards which made the converſation not evidence.

Boyd, juſtice,—"We have no doubt; Mr. attorney-"general go on with the evidence." Of courſe the parol teſtimony was received. *Ridgeway's Rep. Carty's Tr.* 73, *and MS. note.*

Rule the Eleventh.

Confeſſions are received in evidence or rejected as inadmiſſible, under a conſideration whether they are or are not intitled to credit. *Leach. Cr. ca.* 222.

In the KING, *v.* WARRICKSHALL, *Old Bailey ſeſſions, April* 1783, the above rule was laid down by EYRE, chief baron, as reſulting from legal principle; wherefore, as he ſaid, it is a miſtaken notion, that the evidence of *confeſſions* and *facts*, which have been obtained from priſoners by *promiſes* or *threats*, is to be rejected from a regard to public faith. No ſuch rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice, as it is repugnant to the general principles of criminal law. For confeſſions are received in evidence, or rejected as inadmiſſible, under a conſideration whether they are or are not intitled to credit. *Leach. Cr. ca.* 2 *Ed.* 222. 3 *Ed.* 298. *Ante* 42.

Rule the Twelfth.

The confeſſion of a priſoner taken upon *oath*, cannot be read in evidence againſt him. *Bull. N. P.* 242. *Vide ſtat. Phil and Mary, ante*

Of courſe, no priſoner brought before a magiſtrate ought to be ſworn. The reaſons of this reſtriction reſults from the moſt obvious principles of juſtice, policy, and humanity.

Rule the Thirteenth.

Though a confeſſion obtained under the impreſſion of fear, or hope of pardon, or taken upon the oath of the defendant, cannot be given in evidence; yet, if any facts ariſe in conſequence of ſuch a confeſſion, they may be given in evidence, and it can never go to the rejection of evidence by witneſſes diſcovered in conſequence of the confeſſion.

This rule was ſolemnly laid down as law, in the KING, *v.* WARRICKSHALL, above cited. EYRE, C. B. ſtating

as undoubted law, that any facts which may arise in conſequence of even ſuch confeſſions may be given in evidence; becauſe, FACTS muſt be ever immutable—the ſame whether the confeſſion which diſcloſes them be true or falſe, and juſtice cannot ſuffer by their admiſſion. *Leach. Cr. ca.* 2 *Ed.* 222. 3 *Ed.* 298.

Therefore in DOROTHY MOZEY's caſe, indicted on the 10 *and* 11 *Will.* 3, *ca.* 3. for ſhop-lifting, *Old-Bailey, February* 1784. Evidence was received of goods found, in conſequence of a confeſſion made by her. And,

BULLER, J. and PERRYN, B. held, that whatever ACTS are done, are evidence; but if thoſe acts are not ſufficient to make out the charge againſt the priſoner, the converſation or confeſſion of the priſoner cannot be received, ſo as to couple it with thoſe acts, in order to make out the ſubject matter of proof.

BULLER, ſaid, "On the authority of a caſe decided "by all the JUDGES, that though confeſſions improperly "obtained, cannot be received in evidence, yet the "*acts* done afterwards may be given in evidence, though "they were done in conſequence of the confeſſion." *Leach. Cr. ca.* 2 *Edit.* 224. 3 *Edit.* 301.

So in LOCKHART's caſe, *Old-Bailey, June* 1785. The priſoner made a full confeſſion, by which it was diſcovered, that part of the property ſtolen had been diſpoſed of to a Mr. *Grant;* and Mr. *Grant* was called by the counſel for the crown to identify the property. The confeſſion had been obtained by ſuch promiſes of favour as rendered it inadmiſſible evidence: and it was contended, that as the diſcovery of Mr. *Grant* reſulted from the illegal confeſſion, which had been obtained from the priſoner, he, Mr. *Grant*, was not a competent witneſs. But the court ſaid the law was clearly ſettled, that although a confeſſion improperly obtained cannot be given in evidence, yet it can never go to the rejection of the evidence of the other witneſſes, which are got in conſequence of ſuch confeſſion. *Leach. Cr. ca.* 2 *Edit.* 300. 3 *Edit.* 430.

And in the KING, *v.* BUTCHER, *Maidſtone, Summer aſſizes*, 1798. It was held, that ſo much of the confeſſion as related ſtrictly to the fact diſcovered by it may

be given in evidence; for the reaſon of rejecting extorted confeſſions, is the apprehenſion that the priſoner may have been thereby induced to ſay what is falſe; but the fact diſcovered ſhews, that ſo much of the confeſſion as immediately relates to it is true. *Leach. Cr. ca. 3 Edit.* 301.

Rule the Fourteenth.

Parol evidence cannot be received of the examination of a priſoner taken before a magiſtrate, unleſs it be clearly proved, that in fact, ſuch examination never was reduced to writing.

As in the KING, *v.* JOHN JACOBS, SAMUEL SELSHIRE, and RICHARD M'DONALD, tried before GOULD, J. for a highway robbery, *Old-Bailey, ſeſſions, February* 1784, 28 *Geo.* 3.

It appeared, that when the priſoners were carried before a juſtice of the peace, *Samuel Selſhire* was admitted to give evidence againſt *Jacobs* and *M'Donald*, and that they all made a full confeſſion of their guilt; but it did NOT appear that either the information of *Selſhire*, or the confeſſion of the other two priſoners had been taken down in writing.

The proſecutor attempted to give *viva voce* teſtimony of their confeſſions.

REYNOLDS, clerk of the arraigns ſaid, it had been the conſtant practice of the court, that when the juſtice has neglected to take a written examination, parol teſtimony of confeſſion may be admitted; but that if he has reduced ſuch examination into writing, no other evidence of it could be received.

COURT. The legiſlature, by the *ſtatutes* 1 *and* 2 *Phil. and Mary, ca.* 13. *ſect.* 4. *and* 2 *and* 3 *Phil. and Mary, ca.* 10. has ordered, "That juſtices of peace, when any "priſoner is brought before them on a charge of felo- "ny, SHALL take the examination of the ſaid priſoner, "and the information of them that bring him, of the "fact and circumſtances thereof; and the ſame, or as "much thereof as may be neceſſary to prove the felony, "SHALL be put in writing, within two days after the

"examination, and certified to the next general gaol deli-"very." *Iriſh*, 10 *Car.* 1. *ca.* 18. The ſtatutes do not leave this matter to the option of the magiſtrates, but they ſay, that he SHALL do it, and whatever may have crept into practice, the directions of this law ought not to be diſpenſed with. The rule of law is the compaſs by which the court ought to be guided. What a priſoner ſays in other places may undoubtedly be received upon *viva voce* teſtimony; but as the law requires that his examination before a magiſtrate SHALL be reduced into writing, and returned to the court, the particulars of ſuch examination cannot be given in evidence *viva voce*, unleſs it be clearly proved, that in fact, ſuch examination never was reduced into writing. *Leach. Cr. ca.* 2 *Ed.* 254. 3 *Ed.* 349.

So in the KING, *v.* JOHN HINXMAN, before ASHURST, J. *Old Bailey*, *July ſeſſions*, 1784, 24 *Geo.* 3.

The priſoner had made a confeſſion before a juſtice of the peace, but his examination was not returned to the court, and it was uncertain whether it had ever been reduced into writing.

It was objected by the priſoner's counſel, on the authority of *Jacob*'s caſe above cited, that parol evidence could not be given of any thing which had been diſcloſed by the priſoner before the magiſtrate, for that it would be permitting his negligence and breach of duty, to operate to the prejudice of the priſoner; as a witneſs by ſelecting only part of what had been ſaid, might, by uſing different words, give a different colour to the fact.

The COURT refuſed the oral teſtimony. *Leach. Cr. Caſes*, 2 *Ed.* 255. 3 *Ed.* 349.

The KING, *v.* ALEXANDER FISHER, before HEATH, J. *Old Bailey*, *January ſeſſions*, 1785, 25 *Geo.* 3. is alſo in point.

The priſoner was tried for a burglary in the dwelling houſe of *B. Ward*. The facts of Mr. *Ward*'s houſe having been broken open in the night time, and the goods mentioned in the indictments ſtolen therefrom were clearly proved; but, there was no other evidence to fix theſe facts upon the priſoner than his *confeſſion*, made on his examination before the committing magiſtrate, and there being no evidence that this confeſſion

was not reduced to writing, the *viva voce* teſtimony of it was rejected. *Leach. Cr. ca.* 3 *Ed.* 349.

NOTE. The above caſe, as reported in the firſt edition of *Leach*'s caſes, is bad law. It is there ſtated, as an "eſtabliſhed rule of law, that the mere confeſſion of a "crime, without one ſingle circumſtance to corroborate "it, is not ſufficient to convict a priſoner, unleſs he "ſhould again confeſs the fact, by pleading guilty to the "indictment." In his ſecond edition, he, however admits, that the above opinion imputed to the court, muſt be a miſ-report, and cites the caſes given in illuſtration of the laſt rule in proof of the error; and in his third edition he has rectified the determination in *Fiſher*'s caſe, as above reported.

Rule the Fifteenth.

It is now a ſettled rule of common law, that in caſes of felonies and miſdemeanors, if the confeſſion of a priſoner be voluntarily made, and regularly proved at the trial, it is ſufficient, if the jury believe it to be true, to convict the priſoner without any corroborating evidence to ſupport it.

As in the KING, *v.* JOHN WHEELER, *Summer aſſizes, Saliſbury*, 1789, 29 *Geo.* 3.

It was contended by the priſoner's counſel, on the authority of *Fiſher*'s caſe, as reported in the firſt edition of *Leach*'s Crown Caſes, that as there was no evidence againſt him but his confeſſion, he muſt be acquitted. But, Lord KENYON, C. J. and BULLER, J. held that *Fiſher*'s caſe, as reported, was not law; and determined that a priſoner may be convicted on his own confeſſion, when proved by legal teſtimony, although it is totally uncorroborated by any other evidence. *Leach. Cr. ca.* 2 *Ed.* 287. 3 *Ed.* 349.

And alſo in the KING, *v.* HALL, *Stafford, Lent aſſizes*, 1790. It was held, that if a confeſſion before a magiſtrate be *not* taken down in writing, it may be given in evidence.

And the ſame rule was adhered to in the KING, *v.* FAGAN, before YELVERTON, C. B. and DAY, J. *Com-*

miſſion of Oyer and Terminer, Dublin, July 1800. 40 *Geo.* 3.

Rule the Sixteenth.

But a confeſſion, whether in writing, or by parol, does not amount to a conviction until the party has pleaded not guilty in open court: for the trial of the confeſſion muſt be by the petit jury. *Gilb. Evid. by Loft,* 137.

Rule the Seventeenth.

Wherever a man's confeſſion is made uſe of againſt him, it muſt all be taken together and not by parcels.

For as was laid down in the KING, *v.* PAINE, if ſuch confeſſion ſhall be taken as evidence to convict a man, it is but juſtice and reaſon, and ſo allowed by the civil law, that his whole confeſſion ſhall be evidence as well for as againſt him. 5 *Mod.* 165. before cited. *ante* .

And as to the contrary deciſion in THROCKMORTON's caſe, it is againſt law, juſtice, mercy, and reaſon. 1 *St. Tr.* 63.

Rule the Eighteenth.

As the ſtatutes of *Philip and Mary* poſitively enact, that the juſtices of the peace *ſhall take* the examination of the priſoner, and reduce the ſame into writing, the court will preſume that the confeſſion of a priſoner was reduced into writing; for the law preſumes that the magiſtrate does his duty, until the contrary be proved. *Leach. Cr. caſes,* 2 *Ed.* 185. 3 *Ed.* 240. *Poſt* *Vide ante* the KING, *v.* HALL. 51.

CHAPTER VII.

Of perſons immediately intereſted in the event of the proſecution, and legal objections affecting their competency.

Rule the Firſt.

HAWKINS conſiders it a general and eſtabliſhed rule, that in all caſes whatſoever, a perſon who is either

to

to be a GAINER or a LOSER, in the event of the cauſe in which he is called to give evidence, whether the advantage, or diſadvantage, be direct and immediate, or conſequential only, is incompetent, and cannot be examined. 2 *Hawk. Pl. Cr.* 46. *Co. Litt.* 6. 1 *Siderf.* 237. 1 *Keb.* 836.

HALE doth not ſtate this rule ſo ſtrongly nor ſo generally as HAWKINS. He ſays, a man, in point of *intereſt*, is not a lawful accuſer or witneſs in *many* caſes. *Vide rule* 6. *Poſt.*

This rule, though univerſal in civil matters, does not exclude the party who proſecutes in the name of the crown, in the right and in behalf of the public; for this, in ordinary caſes of perſonal wrong, there is an obvious reaſon; ſince he doth not come for perſonal compenſation in the ſhape of *damages*, which are recoverable only by civil action; nor is he by intendment of law preſumed to come for private revenge in the puniſhment of the offender; but in pure maintenance of the laws and public juſtice. *Gilb. Evid. by Loft*, 221.

However the principle is yet more general; for not to mention *appeals of murder*, which perhaps with legal propriety may be claſſed under this head, ſince the law will not preſume an intereſt in the indulgence of an acrimonial and unſocial paſſion ſuch as revenge is, a party ſhall proſecute by indictment where he hath a direct intereſt in the event, that is, where he hath been *robbed*, and the goods are out of his poſſeſſion, remaining in the hands of the party charged. And here, if he *proſecutes to conviction*, he ſhall have, by the ſtatute, a writ of reſtitution. Nay, he ſhall often be without recovery of his goods, unleſs he proſecutes; for, he ſhall not have trover or other civil action againſt the felon, for the treſpaſs mergeth in the felony. *Gilb. Evid. by Loft*, 222.

The true and moſt general principle therefore, which governeth this diſtinction is, that it concerneth the community, that crimes paſs not wholly unpuniſhed, and if the party ſuffering might not proſecute, few beſide might have the certain knowledge of the fact, or the diſpoſi-

tion

tion of bringing it to trial, which muſt combine to call forth the exertions of public juſtice. *Gilb. Rep.* 113.

NOTE. By the common law there was no reſtitution of goods upon an indictment, becauſe it is at the ſuit of the king only, and therefore the party was obliged to bring an appeal of robbery, in order to have his goods again; but by ſtatute on a conviction of larceny particularly, the proſecutor ſhall have his goods reſtored. *Stat.* 21 *Hen.* 8. *ca.* 11. *Iriſh.* 28 *Hen.* 8. *ca.* 10. 1 *Stat. at large* 101. 3 *Inſt.* 242. 4 *Comment.* 355, 356.

And for the reaſon given above, a party may be a witneſs where there is a fine to the king, no private advantage ariſing to the witneſs immediately or conſequentially, from the proſecution; but if there be any advantage of private benefit to accrue by the proſecution, the party is equally excluded as in a private action. *Gilb. Evid. by Loft* 232.

So in an indictment or information of aſſault and battery, the perſon injured may be a witneſs, becauſe here the fine is to the king, and no private benefit accrues to the party from the ſucceſs of the proſecution. *Ibid. Hardr.* 331.

Yet ſuch verdict in an information, founded only on the party's own oath, cannot be given in evidence in a civil action, for that were indirectly to ſuffer the party to atteſt in his own behalf. *Gilb. Law of Evid. by Loft*, 232.

But though, in criminal caſes, the exceptions are few, in which a party *intereſted* in the event, may not be a witneſs; yet in civil caſes there is hardly at common law an inſtance, where the cauſe is ſo circumſtanced, as that he may, and this upon clear reaſons operating to ſuch excluſion. *Vide the next chapter.*

Rule the Second.

Yet ſo far the rule holds, being founded on a principle not to be ſuperceded of neceſſary juſtice; that where a perſon is to *diſcharge* himſelf by ſuch evidence as would effect a conviction of the party on his trial, he ſhall not be

be admitted to give evidence in ſupport of a public proſecution. *Bull, N. P.* 288, 289.

For, ſays GILBERT, C. B. where a man who is intereſted in the matter in queſtion, would alſo prove it, it rather is a ground for diſtruſt than any juſt cauſe of belief: for men are generally ſo ſhort-ſighted, as to look to their own private benefit, which is near them, rather than to the good of the world, which is more remote. Therefore, from the nature of human paſſions and actions, there is more reaſon to diſtruſt ſuch a biaſſed teſtimony than to believe it. It is alſo eaſy for perſons who are prejudiced and prepoſſeſſed, to put falſe and unequal gloſſes upon what they give in evidence, and therefore the law removes them from teſtimony, to prevent their ſliding into perjury: and it can be no injury to truth to remove thoſe from the jury, whoſe teſtimony may hurt themſelves, and can never induce any rational belief. *Gilb. Evid. by Loft* 223.

Rule the Third.

On the principle of the firſt general rule, if a *defendant* is to be examined on the part of the crown, the attorney-general muſt firſt enter *noli proſequi*.

As in WARD, *v.* MAN, 8 *December* 1741: Lord HARDWICKE ſaid, in crown proſecutions, no defendant can be examined in behalf even of the king, but the attorney-general, at the bar, enters a *noli proſequi* againſt that particular defendant before he can be admitted as a witneſs; and this was done in a caſe by *Trevor*, when attorney-general, who was afterwards lord chief juſtice of the common pleas. 2 *Atk.* 229.

So in the KING, *v.* ELLIS, BLAKE and others, ſittings after Hilary, 1802. Defendants were indicted for a conſpiracy to perſuade a witneſs to abſent himſelf from the trial of a perſon charged with uttering baſe money, knowing it to be counterfeited.

The attorney-general *(Law)* entered a *nol. proſ.* in regard to two defendants, who were examined as witneſſes for the crown, and on their evidence the other defendants were found *guilty*. *MS.*

This

This act of the prerogative has however been ſeldom exerciſed. A witneſs ſo circumſtanced, though competent, would appear in a very queſtionable ſhape; for his credit would be liable to every impeachment, by which the teſtimony of an *approver*, or an *accomplice*, could be weakened upon a croſs examination.

Rule the Fourth.

In criminal proſecutions, where there are ſeveral defendants on trial, and it appears, on cloſing the evidence on the part of the crown, that againſt one or more of them no evidence has been given, the court will, in its diſcretion, direct an iſſue to go up to the jury, on the part of the defendant or defendants, againſt whom *no* evidence had appeared; and on a verdict of not guilty being recorded, will ſuffer ſuch defendant or defendants ſo acquitted, to give evidence on the part of the priſoner or priſoners remaining at the bar on trial.

As in the KING, *v.* captain SIMON FRAZER, and Ross, a ſoldier, for the murder of CHRISTOPHER DIXON, *Summer aſſizes, county of Kildare, at Athy*, 1797.

Eſpinaſſe, of counſel for the priſoners, moved, on the cloſing of the evidence, that a ſeparate iſſue ſhould be ſent up to the jury, ſuggeſting that no evidence had appeared againſt the priſoner *Frazer*, that could ſupport the charge in the indictment.

Mac Nally for the crown, objected. He would not ſay that the court had not a diſcretionary authority to ſend up ſuch an iſſue, but in this caſe the circumſtances did not warrant the motion. The homicide had been clearly proved, and no provocation of any kind had been ſet up in juſtification—there was evidence to go to the jury againſt both priſoners, and the jury would determine to what degree of atrocity. A mortal weapon had been uſed, a dirk or dagger—no fact appeared to ſhew that the death was the conſequence of ſelf-defence, or occaſioned by accident, or by misfortune—as to juſtifiable homicide that was out of the caſe, for no homicide is juſtifiable that is not ſanctioned by the expreſs letter of the law, ſuch as the executioner putting the convict

to

to death, by legal warrant; and the ſlighteſt evidence of homicide of any ſpecies, not juſtifiable, was a bar to the indulgence claimed by the priſoner from the court. If the court concluded on the perfect innocence of *Frazer*, it would be aſſuming to itſelf the peculiar province of the jury, who were the only conſtitutional judges of facts and of credit, and who alone, in this as in other caſes, had a right to decide on the facts that had been given in evidence, and the credit of the witneſſes.

Eſpinaſſe anſwered, that at an aſſizes held at Naas, an officer and ſerjeant were tried before Mr. Juſtice KELLY, for the murder of a priſoner, who had attempted to eſcape from their cuſtody at Leixlip. That it was argued on that occaſion by the counſel for the crown, that a ſeparate iſſue ſhould not be ſent up to the jury for the ſerjeant; but the court was pleaſed to over-rule the objection; the iſſue was accordingly ſent up, the ſerjeant was acquitted, and immediately admitted an evidence for the officer.

Mac Nally in reply. Every deciſion by ſuch a judge as Mr. Juſtice KELLY, muſt have weight; but here the deciſion is given without any ſtatement of the facts, or the reaſons which induced that truly conſtitutional, impartial and humane judge, to exerciſe his diſcretion in favour of the priſoner, againſt whom, moſt probably, there was not a ſcintilla of evidence. But here, whatever may be the feeling of the court, or of the jury, it cannot be ſaid that there is no evidence of unjuſtifiable homicide. Here it appeared, by incontrovertible evidence, that the priſoners *Frazer* and *Roſs* were countrymen, maſter and ſerjeant, officer and ſoldier, in the ſame Scotch regiment. That when the deceaſed was taken into cuſtody for being out late, he was repeatedly ſtruck. That *Frazer* ordered the deceaſed to get behind him, which he refuſing, *Frazer* ſtruck him on the cheek, and the blow was not returned; and he went behind *Roſs*. It was true he leaped off the horſe; it was true he ran away—but it was proved he was followed by *Roſs*, who was followed by *Frazer*, both having ſwords, the deceaſed unarmed. It was proved he was killed,

and by the hand of *Roſs*, for it was proved that *Frazer* ſaid ſo. Was it denied that he was found weltering in blood, bleeding from his breaſt and from his face; was it not admitted that no ſerious provocation was given? did he die by a ſingle blow? no, the ſurgeon ſwore one wound penetrated the liver and entered the ſtomach—it was a mortal wound; another was on his cheſt, it was ſuperficial; a third was in his back, and it paſſed through the ſhoulder blade—it was mortal! a fourth, and a mortal wound too, penetrated the belly: he was cut on the noſe; the end of the noſe was ſeparated, the jaw was cut through, it was a cut—not a ſtab—and there were no wounds on his hands, which ſhewed he had not ſtruggled with, nor griped the dirk. Now, what is the excuſe? one witneſs ſays, he believes it was the duty of officers to take up perſons walking out at the hour *Dixon* was from home; and, that the county was out of the peace. If this be not evidence of wilful and malicious murder, murder is unknown to the law of Ireland. Yet, it is ſaid, there is no evidence of manſlaughter, or any other ſpecies of homicide, proper to be left to the jury againſt *Frazer*. If his innocence be ſo apparent, why has his counſel called witneſſes on his part, and thereby put his innocence in iſſue? would they have done ſo if they could have depended on the *ex parte* evidence and their own croſs examination of the witneſſes for the proſecution. Suppoſe the judge ſubmitted to the motion preſſed upon him, and the jury ſhould bring in a verdict of manſlaughter, would not that ſtigmatize Captain *Frazer* with felony? it would be convicting him of a crime which in contemplation of law renders the delinquent infamous, ſhuts up his mouth from giving evidence, and brands him with incompetency. Would the court, in that caſe, poſtpone the trial of the priſoner *Roſs*, until the priſoner *Frazer* was purged of his incapacities, by pleading the benefit of clergy in bar of execution? would the court wait until the record of his offence was ſtamped upon his hand, by burning with a hot iron? or would the court wait until the king's pardon could be procured to remit the infamy of branding, and thereby reſtore the competency?

To

To do the firſt, could not be preſumed, becauſe the hiſtory of the Pleas of the Crown cannot ſhew a precedent—the ſecond would be impoſſible, becauſe the priſoner being in charge, the court could not indulge him by adjourning the trial until ſuch pardon ſhould be procured.

TOLER, ſolicitor-general, (who ſat as judge) ſaid, he did not conſider that granting the motion was a favour to captain *Frazer*, therefore would not heſitate to ſend up an iſſue to the jury on the charge againſt him. The iſſue was accordingly ſent up, and the jury bringing in a verdict of not guilty; *Frazer* was ſworn, and *Roſs* was alſo acquitted.

Rule the Fifth.

As no perſon is a competent witneſs who is a gainer or loſer by the event of the cauſe; ſo a perſon who is *bail* for the defendant, cannot be a witneſs for him without conſent.

As in the KING, *v.* JOHN HAMPDEN, *miſdemeanor*, *Hilary*, 36 *Car.* 2. 1683. *B. R.* Sir *Henry Hobart* being called as a witneſs for the defendant, ſir *Robert Sawyer*, attorney-general, oppoſed his being ſworn, on the ground that he was one of the defendant's bail; and,

Sir GEORGE JEFFERIES, C. J. ſaid, if he be one of his bail he ſhall appear in this court the firſt day of this term, and ſo from day to day until he ſhall be diſcharged; and remains under that recognizance; then, in any caſe againſt him he cannot be a witneſs for him: for, in every ordinary caſe, it is every day's practice to deny bail to be witneſſes: but when the bail is diſcharged, and the priſoner rendered in cuſtody, then he may be a witneſs. And he admitted that the bail might be changed in order to make him a witneſs: but the attorney-general conſenting that ſir *Henry Hobart* might be examined, he was ſworn. 3 *St. Tr.* 842.

In civil caſes the reaſon of the rule is, becauſe the bail are directly intereſted; for if a verdict be againſt the principal, the bail become immediately anſwerable: and this applies to caſes of *miſdemeanor*, where the principal appears by attorney, and has it in his power to

abſcond on conviction to avoid ſentence, by which the recognizance of bail would be eſtreated.

So in HOPKINS, *v.* NEAL *and* NEWMAN, *Hil.* 9 *Geo.* 2. *B. R.* where the plaintiff ſued as an INFANT by her father, the *prochein amy*, for an aſſault and battery; the father was refuſed to be a witneſs by lord HARDWICKE, at *Niſi Prius*, he being liable to coſts. 2 *Stra.* 1026.

Rule the Sixth.

In informations before magiſtrates on penal ſtatutes, where the informer is intitled to the whole, or part of the penalty, he is an incompetent witneſs; (unleſs made competent by ſtatute) for he is directly intereſted in the event. The *King*, v. *Tilly*, 1 *Stra.* 316.

Rule the Seventh.

In an indictment or information on the ſtatute of uſury, the party to the uſurious contract cannot be a witneſs while he hath an intereſt in the queſtion, becauſe that were to avoid his own ſecurities: but after he hath paid the money he is a good witneſs; becauſe then the party guilty is fined to the king, and there is no advantage to the proſecutor from the information. *Co. Litt.* 6. *b.* 2 *Roll. Abr.* 689. 1 *Hale, P. C.* 202, 203. *ante* . *Abraham's qui tam, v. Bunn. Poſt*

BULLER, to the ſame point ſays, in an indictment for perjury on the ſtatute, the perſon injured cannot be a witneſs, becauſe the ſtatute gives him ten pounds, but in an indictment at common law, the party injured may be a witneſs. 2 *Hawk. P. C. ca.* 46. *Bull. Niſ. Pri.* 289.

Rule the Eighth.

But by ſtatute, the inhabitants of any place or pariſh are good witneſſes, notwithſtanding the penalty to be given to the poor, or otherwiſe, for the benefit of the pariſh or place; provided the penalty doth not exceed twenty pounds. *Stat.* 27 *Geo.* 3. *ca.* 29

Rule the Ninth.

Alſo the inhabitants of a county may be examined as witneſſes on indictments for not repairing county bridges. *Stat.* 1 *Ann. ca.* 18.

Rule the Tenth.

In actions brought on the *ſtatute of Winton*, 13 *Edw.* 1. *ſt.* 2. *ca.* 1. which gives an action againſt the hundred in caſes of hue and cry, in caſes of robbery, perſons inhabiting within the hundred may be witneſſes. *Stat.* 8 *Geo.* 12. *ca.* 16.

Rule the Eleventh.

So where rewards are given by ſtatute, for apprehending or convicting perſons charged with particular offences, as robbery on the highway, burglary, &c. the perſons apprehending and proſecuting with a view to thoſe rewards are competent witneſſes. *Stats.* 3 *and* 4 *Will.* 3. *ca.* 8. 5 *Ann. ca.* 31.

Rule the Twelfth.

So where a reward is offered by the royal proclamation, from the king in council, perſons proſecuting in expectation of ſuch reward are admiſſible.

So ruled at the *Old-Bailey*, *London*, and alſo at the ſeſſions-houſe, St. *Margaret's-hill*, *Southwark*, on the trials of the rioters, 1780.

Lord GEORGE GORDON, on the 10th of *June*, 1780, commanded a numerous mob of fanatics, ſtiling themſelves "*The Proteſtant Aſſociation*," in St. *George's-fields*, for the purpoſe, as they advertiſed the public, of obtaining the repeal of a ſtatute, paſſed for the relief of his majeſty's Roman catholic ſubjects. Theſe zealots marched to the parliament-houſe in a body, attacked and aſſaulted many of the peers and commoners, burned chapels, broke open the public priſons, ſet fire to them, and diſcharged the felons and debtors; attacked the bank,

bank, and deſtroyed ſeveral private houſes, particularly thoſe of lord *Mansfield*, Sir *George Saville*, and Mr. *Edmund Burke*. Rewards were offered for the apprehending and convicting of the offenders, and a great number of them having been taken, indicted and tried for various offences, according to their ſeveral caſes, a queſtion aroſe in court, "Whether perſons expecting "the reward offered, and being therefore intereſted in "the conviction of the parties indicted, were admiſſible "witneſs againſt them?"

The JUDGES were of opinion, that the teſtimony of witneſſes who were intitled to, and claimed the reward, was admiſſible, notwithſtanding that intereſt. Several caſes were cited, particularly the caſes of robbery and larceny, where not only reſtitution of ſtolen goods, but the claim and title to parliamentary reward depended on the conviction of the perſons charged as offenders. So in the caſe of the bank, poſt-office, and other public places, proſecutors are intitled to rewards; and yet the expectation or title to thoſe rewards had never been conſidered as creating ſuch an *intereſt* in the witneſs as would deſtroy his competency. *MS. note of the caſe. Leach. Cr. ca.* 2 *Edit.* 251. 3 *Edit.* 353. *Onſ. N. P.* 251.

So in the KING, *v.* JOHN LEARY, *commiſſion of oyer and terminer, Dublin, December* 1795. 26 *Geo.* 3.

GEORGE, B. In ſumming up the evidence to the jury ſaid, a witneſs is incompetent who is perſonally intereſted in any cauſe in which he is produced; and therefore where this intereſt conſiſts of pecuniary conſideration, or of any other kind, ſuch as pardon for offences, it is a fit ſubject for the jury to conſider. In civil caſes clearly, if a witneſs be intereſted, he cannot be examined. But in criminal caſes, for the ſafety of the public, getting reward does not in a court of criminal juriſdiction, diſable a witneſs from giving teſtimony, though it may go to his credit. *Ridgeway's rep. of the trial*, 167. *and MS.*

In the KING, *v.* DYLONE, *Trinity*, 7 *Geo.* 3. *Niſi Prius*. Indictment againſt a prieſt of the church of Rome, for aſſiſting and celebrating maſs. The proſecutor was produced as a witneſs; but objected to

the

the defendant, a reward being the right of any perſon who ſhall convict a popiſh biſhop or prieſt of that offence.

Lord MANSFIELD over-ruled the objection; ſaying it was the conſtant practice to admit the proſecutors on an indictment for highway robbery, or burglary, &c. though they are intitled to a reward. *Onſl. N. P.* 257. *Eſp. N. P.* 713.

CHAPTER VIII.

How far perſons not profeſſing the chriſtian religion, and chriſtians diſſenting from the eſtabliſhed mode of taking an oath, may be admitted to give evidence; and of objections to witneſſes on other religious grounds.

Rule the Firſt.

JEWS being ſworn on the *old teſtament* to depoſe the truth, the whole truth, and nothing but the truth, are admiſſible witneſſes.

HALE holds, that a *jew*, who only owns the old teſtament, is a competent witneſs: for although the regular oath, as it is allowed by the laws of England, is, *tactis ſacroſanctis dei evangelis*, which ſuppoſes a man to be a *chriſtian*, yet, in caſes of *neceſſity*, as in foreign contracts, between merchant and merchant, which are many times tranſacted by *jewiſh* brokers, the teſtimony of a jew *tacto libro legis moſavicæ*, is not to be rejected, and is uſed among all nations. 2 *Hale, P. C.* 279. *Omichund, v. Barker Atkyn* 21. *Poſt*

There is no caſe wherein a *jew* was ſworn and examined as a witneſs until after the reſtoration. They were drove out of England by perſecution in the 18th year of *Edw.* 1. and did not return until the uſurpation of *Oliver Cromwell.* 1 *Atk.* 31. *Poſt*

Rule the Second.

On the ground of *neceſſity*, and *ſound policy*, and *ſpecial circumſtances*, a PAGAN or INFIDEL, of *any deſcription* whatſoever, ſworn according to the ceremonies of the religion which he profeſſes, is an admiſſible witneſs in a cauſe civil, or criminal.

COKE ſays, an *infidel* cannot be a witneſs; but HALE doubts whether it be eſſential to the credibility of an oath, that it ſhould be taken upon the old or new teſtament; and obſerves, that if an infidel is not to be admitted as a witneſs, the conſequence would be, that a jew, who owns the old teſtament, could not be a witneſs. *Co. Litt.* 6. 2 *Inſt.* 479. 3 *Inſt.* 165. 4 *Inſt.* 279. *Flet. b.* 5 *ca.* 22. *Bract.* 116. 2 *Hale. P. C.* 279. *Ante* 2, 8.

The oath of idolatrous infidels have been admitted in the municipal laws of many kingdoms, eſpecially *ſi juraverit per verum Deum creatorem*, and ſpecial are inſtituted in Spain, touching the forms of the oaths of infidels. *Vide Covarruvium. tom.* 1. *part.* 1. *De juramenti forma, p.* 249. *Antwerp* 1614. 2 *Hale, P. C.* 279.

And it were a very hard caſe, if a murder committed here in England, in the preſence only of a turk or a jew, that owns not the chriſtian religion, ſhould be diſpuniſhable, becauſe ſuch an oath ſhould not be taken which the witneſs holds binding, and cannot ſwear otherwiſe, and poſſibly might think himſelf under no obligation, if ſworn according to the uſual ſtile of the courts in England. 2 *Hales, P. C.* 279.

But then it muſt be agreed, that the *credit* of ſuch a teſtimony muſt be left to the jury. *Ibid.*

In ORNYCHUND, *v.* BARKER, *chanc. Mich.* 1744, the law reſpecting the admiſſibility of pagans, &c. to give evidence was elaborately argued, and finally determined.

CASE.—Purſuant to an order of chancery, a commiſſion went to the *Eaſt-Indies*, and the commiſſioners certified, that among other witneſſes for the plaintiff, they had examined *Ramkeſſenſent and Ramchurnecooberage*, and ſeveral other ſubjects to the great mogul, being perſons who

who profeſs the Gentou religion; and that they were ſolemnly ſworn in the following manner, *viz.* "The "ſeveral perſons being before us, with a Bramin prieſt "of the Gentou religion, the oath preſcribed to be "taken by the witneſſes was interpreted to each witneſs "reſpectively; after which they did ſeverally, with "their hands, touch the foot of the Bramin prieſt of "the Gentou religion, being alſo before us, with ano-"ther Bramin or prieſt of the ſame religion; the oath "preſcribed to be taken by the witneſſes was inter-"preted to him; after which *Neenderam Sunnah*, being "himſelf a prieſt, did touch the hand of the Bramin, "the ſame being the uſual and moſt ſolemn form in "which oaths are moſt uſually adminiſtered to wit-"neſſes who profeſs the Gentou religion, and the ſame "manner in which oaths are uſually adminiſtered to "ſuch witneſſes in the courts of juſtice erected by let-"ters patent of the late king at Calcutta."

The cauſe came on upon the merits, and the bill was brought to have a ſatisfaction for 67,955 rupees, amounting to about 7,600*l.* Engliſh money, from the eſtate of the late Mr. *Barker*, the father of the defendant.

Mr. *Barker*, in July 1729, being appointed by the Eaſt-India company chief of Patna, applied to the plaintiff, who was a conſiderable merchant, to be engaged in partnerſhip with him in the ſale of goods.

The plaintiff was to advance the money for buying the goods, and in conſideration thereof *Barker* was to allow him intereſt upon a moiety of twelve *per cent.*

The goods were ſold by *Barker* for a great profit, and the whole money received by him; but he refuſed to come to any account with the plaintiff, upon which he filed his bill in 1736, in the mayor's court, in Calcutta, and when the cauſe was ready for hearing there, *Barker* left Calcutta, and took his paſſage for Europe, and upon his withdrawing himſelf, the court at Calcutta interpreted it to be a flight from juſtice, and that he ſhould pay plaintiff's demand in full and all his coſts.

Barker died in the voyage; but by his will, charges his real and perſonal eſtate with the payment of his debts.

The end of the bill was, that all books and papers relating to the dealings between *Barker* and the plaintiff might be produced, and that the ſum before mentioned might be paid with ſubſequent intereſt, and the coſts in the mayor's court at Calcutta.

The attorney-general (ſir *Dudley Ryder*) for the plaintiff, offered to read the depoſition of *Ramkiſſenſeat*, but the counſel for the defendant objecting to his being a proper witneſs, Lord HARDWICKE, chancellor, ordered the commiſſion and the return to be read, and likewiſe the letters patent.

Atkyns argued in ſupport of the objection. *Firſt*, that as the law of England now ſtands, no oath can be adminiſtered to make a man a competent witneſs, but the oath upon the Evangeliſts. *Secondly*, that it would be contrary even to the rules of equity to admit any other.

He argued, that from the oldeſt authorities extant, down to the preſent time, the rule has been uniform and invariable, as to the particular oath required; and to ſhew that ſo long ago as *Edw.* 1. time, at leaſt four hundred years, the general definition of an oath was, "affirming or denying a thing, with a ſolemn appeal to "the ſacred writings for the truth of what he ſaid," he cited: *Fleta lib.* 5. *ca.* 22. *p.* 344. *Bract.* 116. *Britt. ca.* 53. *p.* 135. *Forteſc. de Laud. Leg. Ang. ca.* 26. *p.* 58. *Co.* 2 *Inſt.* 479. 3 *Inſt.* 165. 4 *Inſt.* 279, *and ſtat.* 21 *Hen.* 8. *ca.* 16. *Ante* 8.

From theſe authorities he concluded, that natural-born ſubjects, aliens and ſtrangers, without reſervation of any form or ceremony in their own religion, relating to oaths, are directed to take the oath upon the holy evangeliſts; ſo that (alluding to *ſtat.* 21 *Hen.* 8.) the legiſlature governed themſelves by the law as it then ſtood, and ſaw no reaſon to alter it for the private convenience of particular perſons.

He ſubmitted, that the perſons offered as witneſſes, were not capable of taking an oath, as the law of England conceives it. Hiſtory repreſented the Gentous as ignorant in their notions of religion, abſurd and ridiculous, and in their ideas of the Deity groſs. How then can they be ſaid to perform ſuch a ceremony with

ſacred

ſacred and religious mind, which the word *ſacramentum* implies? *Ante* 8.

To ſupport this, he ſtated the ceremony ſet forth in the certificate of the commiſſioners, which could not be ſaid *Deum in teſtem vocare*, nor *actus divini cultus*. So far from being accompanied with fear, or the worſhip of GOD, as an oath in our law ought to be, it was meanly proſtrating the body at the foot of a prieſt, and calling upon the *creature* inſtead of the *creator*.

As to latter opinions, *Hawkins* ſays, it ſeems to be agreed *to be a good exception, that a witneſs is an infidel*, that is, that he believes neither the old nor new teſtament to be the word of GOD, on one of which the law requires the oath ſhould be adminiſtered. *Hawk. ca. Evidence.*

He then quoted ſir MATTHEW HALE, anticipating that his opinion would be uſed againſt him, but contending it was in his favour. 2 *Hale, P. C.* 279. *Ante Ca.* 1 *and* 2.

He denied the conſequence drawn by *Hale* from *Coke*'s poſition, *that an infidel cannot be a witneſs, therefore a jew cannot be one*; for they believe a GOD juſt in the ſame manner as the chriſtians do; and the old teſtament is as much the *evangelium* to them, as the new is to us; and therefore widely different from the infidel, who has no notion of the true GOD.

In ROBEELY, *v.* LANGSTON, this was the very reaſon for admitting the evidence of the jews. KEELING ſwore jews on the old teſtament; and it was held to be an oath, on which by the *ſtat. of Eliz.* there might be an aſſignment of perjury; for it is within the general words of *ſacra ſancta evangelia*; ſo of the common prayer book that hath the epiſtles and goſpels; but *query* of a pſalm book only. 2 *Roll.* 314.

On this ground the court formed their opinion, and not upon a conſideration of their being brokers in foreign contracts between merchant and merchant.

Hale does not poſitively ſay, that by the laws of England a perſon who owns not the chriſtian religion, may be examined according to the form of his own religion; but, is only commending the municipal laws of other

kingdoms, and throws it out rather as a *wiſh*, that the rule were to prevail here in caſes of *neceſſity*, than as his *opinion*: therefore the utmoſt can be collected from what he ſays is, that he thought it a defect in our law. And though his genius and knowledge were equal perhaps to any one man of the profeſſion, yet in the other ſcale may be put the wiſdom and experience of the great and eminent perſons, who for ages before his time have adhered to the form of an oath, as a conſtant and invariable rule.

Beſides, the preſent cannot be called a caſe of *neceſſity*, becauſe there are perſons in India privy to all theſe tranſactions, who are under no objection, as to their capacity, of taking an oath; but the plaintiff knew that natives of the ſame country, engaged in the ſame intereſt, and the ſame buſineſs with themſelves, were much more inclinable to ſwear for them.

The legiſlature only can diſpenſe with the common and uſual form of oaths, and that is the caſe of the quakers, who are relieved by *ſtat.* 7 *and* 8 *Will.* 3. *ca.* 34. *ſect.* 1. *Poſt*

If the law of England, with regard to the form of an oath was ſo ſtrict, that the judges did not think themſelves juſtified in admitting the moſt ſolemn affirmations and declarations of the quakers inſtead of the oath, though in favour of perſons who agreed in the ſubſtantial and fundamental part of the chriſtian religion with the church of England, where is the reaſon for admitting infidels and idolaters?

Second point. It would be contrary to the rules of equity to admit this evidence. It would give riſe to hardſhips and inconveniencies to the defendant. It would bring him into court on unequal terms. One manifeſt advantage to the plaintiff would be, that notwithſtanding his witneſſes ſhould aſſert the groſſeſt falſehoods, and be guilty of the moſt notorious perjury, yet the defendants would be without remedy, for *no indictment* could be ſupported againſt them, it being a material ingredient in indictments of this kind, that *tacto perſe ſacro evangelio voluntarie et corrupte commiſſit perjuriam*, and that omitting theſe words would be fatal error; for

it

it will not be ſufficient to ſay, that *touching the foot of the prieſt* with his right hand, *voluntarie et corrupte commiſſit perjuriam.*

Attorney-general (ſir *Dudley Ryder*) for the plaintiff.

Firſt, The matters in queſtion are matters of *commerce* ariſing in a foreign country, in a foreign juriſdiction, between a chriſtian and an infidel. *Secondly*, In this country the Gentou religion prevailed; and Calcutta is only a factory within this country. *Thirdly*, The witneſſes do *believe in a* DEITY. *Fourthly*, They not only believe in a DEITY, but in ſwearing they uſe an expreſſion equivalent to ours, *So help me* GOD. *Fifthly*, Solemn oaths to atteſt facts, are uſual amongſt them. *Sixthly*, They underſtand an oath in the ſame manner we do. *Seventhly*, By the letters patent eſtabliſhing a court at Calcutta, there is the ſtrongeſt reaſon to admit their evidence. *Eighthly*, In point of fact, Gentous are admitted as witneſſes in the court of Calcutta. *Ninthly*, The manner made uſe of in the preſent cauſe, is the moſt ſolemn and cuſtomary. *Tenthly*, Theſe witneſſes are all of the Gentou religion.

He then ſubmitted, whether a perſon of ſuch a religion and an infidel, may be admitted as a witneſs; and made two propoſitions. *Firſt*, That the witneſs is capable of taking an oath as an infidel. *Secondly*, That there is nothing in our law that prevents him from being a witneſs.

An infidel properly defined is a deiſt, that does not believe in the Chriſtian religion. All that in point of nature and reaſon is neceſſary to qualify a perſon for ſwearing, is the belief of a GOD, and an imprecation of the divine being upon him if he ſwears falſely. This is the ſenſe of all civilized nations, the foundation of all treaties; *nullum enim vinculum ad aſtringendam fidem jure-jurando majores arcius eſſe voluerint.* Lib. tert. M. T. li. de Offic. ſec. 31.

The beſt writers on chriſtian morality have gone ſo far as to admit the oath to falſe gods. It is the ſenſe of *Grotius*. *Lib.* 2. *ca.* 13. *ſ.* 12.

Nothing is proper to the oath here, but *ſo help me* GOD; when it comes to the corporal part it is *ſupra*

ſanctum

ſanctum evangelium, which is a mere ceremony and not eſſential.

The jewiſh religion and the old patriarchs conſidered the heathens capable of an oath. The inſtance of *Iſaac* and *Abimilech* ſwearing to one another. *Jacob* ſwears by the fear of his father *Iſaac*, and accepted of *Laban*'s oath without heſitation, though he ſwore by falſe gods. *Geneſ. ca.* 26 *v.* 31. *Ca.* 3. *v.* 53.

Conſider the circumſtances and ſituation of the Gentous with reſpect to the oath they have taken. *Firſt*, As to the form of the oath; and then as to the corporal parts. As to the form of the words; it is the ſame we make uſe of here, for the interrogatory, *Do you believe in the ſupreme Being*, &c. is read over and interpreted to him, and he takes it in the ſame ſenſe as other people do, which will put an end to the whole objection. As to the corporal part, at leaſt it ſhews humility, and is in all reſpects applicable to the kiſſing of the book, and equally ſignificant, for both are no more than ſigns, and not material to the oath.

Grotius ſhews, there is more than one form of oath: a greater authority, our SAVIOUR ſays in *Matthew*'s goſpel, *who ſwears by the Temple, ſwears by the* GOD *who inhabits it.* So that all terminates in a ſolemn appeal to the DEITY for the truth of what he ſays. There are paſſages in *Livy*, *Polybius* and *Grotius*, which ſhew that oaths are arbitrary; and the conſequence muſt be, that an infidel is capable of an oath.

Secondly, Whether there is any thing in the law of England that impugns it?

COKE ſays, an infidel cannot be a witneſs: but though that may be a general rule, does it follow that there ſhall be no exception? does not our law ſay, *exceptio probat regulam?* Certainly, there ſhould be general rules relative to evidence, but if exceptions were not allowed, it would be better to demoliſh all the general rules. There is no general rule without exception but this, that the beſt evidence ſhall be admitted which the nature of the caſe will afford.

Rules as general as this are broke in upon for the ſake of allowing evidence. No rule more binding than that a man ſhall not be admitted an evidence in his own caſe; and

and yet the ſtatute of hue and cry is an exception. A man's books are allowed to be evidence, or which is in ſubſtance the ſame, his ſervants' books, becauſe the nature of the caſe requires it. A wife cannot be a witneſs againſt her huſband, has been broke in upon in caſes of treaſon. So a man may be examined without oath; for the laſt dying words of a man are given in evidence in the caſe of murder. A child may be examined without oath, but if capable of conſidering the obligation of an oath, may be ſworn. The court denied the laſt exception to be law. *Vide Poſt. ca.* "*Huſband & Wife;*" "*Infant, &c.*"

Admitting a jew to be ſworn is an exception to the general rule. What is the definition of an infidel? why one who does not believe in the chriſtian religion. Then a jew is an infidel, for the ſenſe of *evangelium* has been perverted, and ought not to be confined to the new teſtament only, for it is uſed by our SAVIOUR as good tidings, in oppoſition to the bondage the jews then underwent, and was delivered to them firſt.

As to the paſſages in *Deuteronomy*, the books of *Moſes* are no part of our religion. They are as much a municipal law to the jews, as the municipal laws here to England, or the laws of *Solon* to Athens, or of *Lycurgus* to Lacedæmon, and therefore foreign to the preſent queſtion.

On a complaint againſt general *Sabine*, a committee of the privy council examined a turk, ſworn upon the alcoran; this agrees with the preſent caſe, and though not done in a court of juſtice it will not take away from the uſefulneſs of the precedent for altering the form of an oath. This Indian witneſs was ſworn by the very ſame words that we do, therefore the court will not preſume that he means any other GOD than we mean.

It is of great moment that we ſhould have commerce and correſpondence with all mankind. Trade and policy require it; and in dealings of this kind it is of infinite conſequence, there ſhould be no failure of juſtice. It has been objected, that there might have been other evidence; but though there might be ſlighter evidence, why ſhould we be tied down to it and debarred of the

preſent

preſent which is ſtronger. Gentous are the common brokers in their country, and the *neceſſity* of the caſe is ſtrong argument.

There was a time when even jews were not ſworn; and on the 5th of November, 1732, there was a commiſſion out of the exchequer, in the caſe of *Lopez*, v. *Nunes*, in which there was a diſtinction between the oath for jews and chriſtians; for if jews, they were directed to be ſworn *ſupra vetus teſtamentum* only.

An objection was likewiſe made, that this Indian would not be liable to be puniſhed for perjury; to which it is anſwered, that if the court ſhould be of opinion, that there is an oath which may be taken, of conſequence he is liable to be puniſhed, if forſworn.

Another objection is, that quakers could not be admitted as witneſſes until an expreſs act of parliament to empower them. The plain anſwer is, that they would not take the oath at all, therefore their ſolemn affirmation was not ſufficient, becauſe it had not the eſſence of an oath.

Upon the whole, as it is a caſe of *neceſſity*, and we have fully in proof from the return of the commiſſioners, that they *believe in the* SUPREME BEING, theſe witneſſes ought to be admitted.

Mr. ſolicitor-general (*Murray*, afterward lord MANSFIELD, C. J.)

It is expreſsly certified by the commiſſioners, that the oath preſcribed to be taken by our law, was read over to the plaintiff's witneſſes. The *objection* is, that they have not made uſe of the corporal ceremony, the kiſſing of the evangeliſts. But they have made uſe of another ſymbol, the taking the prieſts foot with their right-hand, becauſe this is the form and ceremony moſt binding in their own religion, and notwithſtanding this, an objection has been taken to the reading of their evidence.

Firſt, Becauſe they have not touched the evangeliſts, and are pagans, and therefore cannot be admitted. *Secondly*, Suppoſing they may be admitted as witneſſes, yet under the ſanction of the oath thus certified, they ought not to be admitted as witneſſes.

It is inſiſted, that the admitting their evidence is contrary to law, and they cannot be indicted for perjury: But, if the admiſſion is not contrary to law, then of courſe the witneſſes are liable to be indicted for perjury, as well as a jew, who may be indicted, *tacto libro legis moſaicæ*. The ſtatute of 5 *Elizabeth* leaves this matter entirely open.

It is ſaid, that no precedent or caſe of a heathen being ſworn, according to the ceremonies of his own religion, exiſted before in England in courts of juſtice, proceeding according to the courts of common law: pagans have been ſworn in the court of admiralty: but no wonder it has not exiſted before, becauſe all our commerce is carried on by going to them, inſtead of their coming here.

The caſe of a jew as a witneſs in a private cauſe, never exiſted until after the reſtoration; they went out of England the 18th of *Edward* 1. and did not return until *Oliver Cromwell*'s time. *Ante* 8.

The only authority of conſequence cited, is a ſaying of lord *Coke*'s. *Co. Litt.* 6. *b. That an infidel cannot be a witneſs.* This ſaying is not warranted by any authority, nor ſupported by any reaſon; and laſtly, contradicted by common experience. Lord *Coke* meant jews as emphatically *infidels*, by ſhutting their eyes againſt the light; he hardly ever mentions them without the appellation of "*infidel* jews," and thus this noble king baniſhed for ever theſe "*infidel uſurious jews*," therefore *Hale* was not miſtaken when he underſtood *Coke* meant jews for infidels as well as others. 2 *Inſt.* 506, 507.

That all the law books, when they mention an oath, mean a chriſtian oath, is no argument at all; *Fleta*'s definition *magis licitum jurare per creatorem quam creaturam*: this ſhews the oath is not quite fixed, but like the oath ſworn in the Roman empire after the eſtabliſhment of chriſtianity; and lord *Coke*'s ſaying an oath is an affirmation or denial by a chriſtian, is no wonder at all, for the laws of England could ſpeak only of the chriſtian oath, becauſe they had no intercourſe with pagans: and does it follow from hence, that no witneſſes can be examined in a caſe that never ſpecially exiſted before, or that an action cannot be brought in a caſe that never happened before? *Ante* 8.

Reaſon, the firſt ground of all laws and general principles, muſt determine the caſe: therefore the only queſtion is, whether upon principles of reaſon, juſtice, and convenience, this witneſs ought to be admitted. He then laid down two propoſitions.

Firſt, That by the practice of England, and of all the nations in the world that are chriſtians, perſons though not of the chriſtian perſuaſion, may be admitted as witneſſes, and ſworn according to their own form.

Cauſes of law depend upon the occaſions that give riſe to them. Where the commerce and intercourſe is moſt frequently with the pagans, the inſtances to be ſure will moſt frequently ariſe.

After the Roman emperors were converts, chriſtians, as well as thoſe who continued pagans, ſwore according to their fancy, without any particular form. The corporal part, which prevails now all over chriſtendom, was taken from the pagans; and, by degrees, under the Greek-Roman emperors, it came to be eſtabliſhed that this ceremony ſhould be uſed. The opinion of the Greek-Roman emperors, as to the oaths of perſons of other perſuaſions is mentioned by *Selden*, "*Aliena autem* "*perſuaſionis homines per id quod venerantur illi, et juxta* "*modum quo venerantur, adjurari conſueverunt*," and he gives a long account of a particular ceremony in ſwearing a jew in courts of juſtice; and before the 18 *Edw.* 1. the perſon adminiſtering an oath to a jew ſaid; if you dont ſpeak the truth, *veniant ſuper caput tuum omnia peccata tua, & parentum tuorum et omnes maledictiones quæ in lege Moſaicæ et prophetarum inſcripte ſunt ſemper tecum maneant*, to which he anſwered, *Amen*. Seld. tom. 2. f. 1467, 1469.

In Spain the turks poſſeſſed the greateſt part of the kingdom, until the time of Ferdinand the catholic. What did they then do when chriſtians and turks had controverſy together? according to *Selden*, the form of the oath was in Spaniſh to ſwear as he hoped to be ſaved, by the contents of the alcoran. *Seld. tom.* 2. 1470.

The queſtion did not ariſe here until after the reſtoration. No caſe of a turk ſworn upon the alcoran in England but that before the council. Here is a material circumſtance in this caſe; a court erected in Calcutta,

by

by the authority of the crown of England, where Indians are ſworn according to the moſt ſolemn part of their own religion.

All occaſions do not ariſe at once; now a particular ſpecies of Indians appears; hereafter another ſpecies of Indians may ariſe; a ſtatute very ſeldom can take in all caſes, therefore the common law *that works itſelf pure* by rules drawn from the fountain of juſtice, is for this reaſon ſuperior to an act of parliament.

The oldeſt books of all countries, mention the ſolemnity of an oath, as a ſecurity for a perſon's ſpeaking the truth; they can do no more than lay him under the moſt ſacred and binding obligations; they all call it appealing to GOD for the truth, and deprecating his vengeances as they ſpeak truth.

There is not a book upon the general law of nature and nations, but admits that chriſtians may allow perſons to ſwear *per Dominum et per falſos* DEO. It is ſo laid down in the decretals, in *Grotius* and in *Puffendorf*, *b.* 4. *ſect.* 4. *p.* 122.

The oath muſt be always underſtood according to the belief of the perſon who takes it; not only chriſtian writers now, but before chriſtianity, the world was divided into a vaſt variety of opinions, and yet every man was admitted to ſpeak according to his own belief. *Dig. b.* 12. *t.* 2. *ſec.* 5. *Lord Stair's Inſt.* 694.

No authority has been produced from any other country that ſuch oath ought not to be admitted: the reaſon why lord chief juſtice EYRE would not ſuffer the Indian, a worſhipper of the ſun, to be ſworn upon the evangeliſts was, becauſe he did not believe in chriſtianity; but if he cannot be ſworn at all, manifeſt injuſtice, and manifeſt inconvenience muſt follow.

Heathens bought the goods, heathens ſent them, heathens knew the price, heathens kept the account. Would it do honour then to the chriſtian religion, to ſay, that you cannot ſwear according to *our* oath, and therefore you ſhall not be ſworn at all? what muſt the heathen courts think of our proceedings? will it not deſtroy all faith and confidence between the contracting parties? Is the caſe of the turk or jew, ſwearing according to their religion, different from the Indian's

ſwearing according to his? the objection is ſtronger againſt the turk, becauſe he ſwears upon the alcoran, which we think an impoſture; but the Indians here ſwear by one ſupreme GOD, without appealing to any particular book or authority in their religion.

It is ſaid, that a heathen is not to be believed. Is it not known that all heathens believe in a GOD? No country can ſubſiſt a twelvemonth where an oath is not thought binding, for the want of it muſt neceſſarily diſſolve ſociety. *Tull. Tuſc. Diſput. lib.* 1. *ſect.* 13.

Secondly, It is objected, that ſuppoſing that they may be admitted as witneſſes, yet under the ſanction of the oath thus certified, they ought not to be admitted, for that the form is ridiculous, and their notions of religion not certified by the commiſſioners. But the oath they have taken ſhews it, for the commiſſioners have certified that they have ſworn by *one GOD*, and alſo proves that they think themſelves under the tie of an oath.

Look into the books of Travels, and you will find that heathens, eſpecially Gentous, believe in *one GOD*, the creator of the world, though they may have ſubordinate deities, as the papiſts who worſhip ſaints. *Relig. Cerem. vol.* 3. 380, 381, 398.

No doubt but they have a notion of GOD, according to *Tully*: but to uſe a greater authority than *Tully*, "They are a law unto themſelves, which ſhew the word "of the law written in their hearts, their conſcience "alſo bearing witneſs, and their thoughts the mean-"while accuſing or elſe excuſing one another." *Paul Epiſt. Rom. ca.* 2. *v.* 14, 15.

The corporal ceremony is a mere matter of form, and not of the eſſence of an oath: *Du Freſne*'s gloſſary ſays, that monks ſwore by kiſſing the feet of the abbots; nay, the abbots ſwore by their word only, from whence the expreſſion, *in verbum ſacerdotis*: this ſhews it has varied much, and is all form.

Clerke, ſame ſide, in addition advanced, that religion *ex vi termini*, means the belief of the exiſtence of a deity. That the neceſſity of admitting this evidence with regard to intercourſes between chriſtian countries themſelves, appeared in *Voet's Comm. on the Pandects* 602.

That

That if this oath cannot be adminiſtered, becauſe not upon the evangeliſts, the ſame objection will hold as to a Dutchman, who does not ſwear as we do on the new teſtament; and for the opinions of the commentators of the civil law he cited *Jacumb.* 4 *ſect. ca.* 4. *t.* 2.

There was a time when ſwearing on the holy evangeliſts was not the practice here; for when St. *Auſtin* introduced the chriſtian religion, the inhabitants were tenacious of their own cuſtoms, and therefore he indulged them.

There were not above twelve jews in the kingdom before the reſtoration. And they deputed one of the principal perſons among them, to come over hither in order to find out whether *Oliver Cromwell* was the *Meſſiah* or not. He then cited *Madd. Hiſt. Exchеq.* 166, 167, & 174.

Alſo *Calvin's* caſe, in which lord *Coke* ſays, "all infi-" dels are in law *perpetui inimici*; for between them as " with the devils, whoſe ſubjects they be, and the chriſ-" tian, there is perpetual hoſtility, &c." But he meant perpetual enemies in a ſpiritual ſenſe, and quotes a paſſage in ſcripture to that purpoſe: *What concord hath Chriſt with Belial*, or what part hath he who believeth with an infidel. 2 *Cor. ca.* 6. *v.* 15. 7 *Rep.* 1 *Trinity*, 6 *Jac.* 1.

The objection that no oath can be altered but by act of parliament, relates to particular officers of the crown. And as to the civil conſequences of puniſhment for perjury, lord *Coke* ſays, that with reſpect to a perſon's being charged with a breach of oath, the queſtion is, whether it was lawfully adminiſtered. 3 *Inſt.* 164. *Ante* 8, 9.

Then if the oath adminiſtered here is agreeable to the genius of the laws of England, will they not be liable to puniſhment for a breach of it; and he ſubmitted, whether the crime may not be ſtated ſpecially, and recite the ceremony of the witneſſes taking the oath, provided it cannot be laid in the uſual form?

Chute, in reply. On reaſons from *neceſſity* he ſupported the argument of *Atkyns*, and then proceeded on the principal queſtion, which he obſerved was endeavoured to be maintained by principles of reaſon, by authority of ſcripture, and by rules of the civil law.

The caſes from *ſcripture* are not ſimilar, and arguments *a pari*. It is natural to have a religion and to believe

believe in GOD; but it is otherwiſe in experience. "Their idols are ſilver and gold, even the works of "men's hands; they that make them are like unto them, "and ſo are all ſuch as put their truſt in them." *Pſalm* 115. *v.* 4. *&* 8. *Atkyns* 37.

As to the oath of *Abraham* and *Abemilech*, there was not then any ſet form, nor was it taken in a court of judicature. *Laban*'s oath to *Jacob* was of the ſame kind, and *Jacob* accepted it, as thinking it better than no oath at all.

The witneſſes are Gentoos, and the commiſſioners ſhould have certified their religion, ſo far as it was concerned in taking an oath, and as to their notions of a Deity's being a rewarder of good and an avenger of evil, *Maffæus's Hiſt. Judeor. lib.* 1. *fo.* 36.

The authorities from *the civil law* do not conclude upon the common law; for the civil law is not received as the rule of *property* here; much leſs in regard to *criminal law*. Civilians hold different rules of property among us, particularly in admitting evidence. They reject *hiſtriones*, *&c.* and whole tribes of people. The greater part of the civil law is only opinions and ſayings of great men; but the ſayings of the common law are the opinions of judges, when the cauſe is judicially before them.

On the opinion of *Hale* he thought with *Atkyns*; and then argued againſt the inſufficiency of the certificate; and then came to the material queſtion—whether theſe witneſſes were admittable by the law of England; and contended that they were not. By the ſtatute of hue and cry, the party robbed was admitted from neceſſity, a third perſon being ſeldom preſent. Tradeſmen's books were admitted, becauſe there was a living perſon to atteſt them. In treaſon, that a wife may be admitted againſt her huſband, is only an opinion of lord *Hale*'s. The ſayings of dying men may be given in evidence, but this is no more than giving evidence of a nuncupative will, and not ſo much evidence of words, as of circumſtances. A man when he is juſt leaving the world, may be ſuppoſed to have a greater regard to truth; but on a trial for murder, this kind of evidence will

will not alter the ſenſe of the court, if it ſhould appear the deceaſed was killed fairly. In major *Oneby*'s caſe it was mentioned by the ſpecial verdict, that the dying man ſaid he was killed after the manner of ſwordſmen; but this did not over-rule ſtronger evidence. 9 *St. Tr.* 14. *Ante book* 2.

It is ſaid, in matters of *cuſtom and tradition*, hearſay evidence is admitted; and rightly ſo; for how can tradition be conveyed but from man to man through a ſuit of ages.

A *child* cannot be admitted *without oath*. LEE, C. J. and PARKER, C. B. ruled it ſo. *Ante b.* 2.

Great ſtreſs has been laid on lord *Coke*'s putting jews on a foot with infidels; in another place *Coke* calls him *an infidel jew*, therefore deſcribes him *ſecundum quid*, and not generally as an *infidel*. *Ante* 8.

Maddox's hiſtory of the exchequer, only ſhews that jews ſhould be ſworn. They had the promiſe of ſcripture largely given them, and the *evangelium* is equally applicable to the jews as to the chriſtians; for the good tidings is not confined to the new teſtament. "And I "will put enmity between thee and the woman, and "between thy ſeed and her ſeed; it ſhall bruiſe thy "head, and thou ſhalt bruiſe her heel." *Geneſ. ca.* 3. *v.* 15.

The *form of indictments* ought to be adhered to. If there was nothing but conſcience to awe a perſon in taking an oath, from the depravity of mankind it would not be ſo binding. It is the apprehenſion of temporal puniſhment, which in a great meaſure prevails on perſons to ſpeak the truth.

There is no authority to ſhew, that indictments have riſen otherwiſe than on the holy evangeliſts; and it is ſaid in *Hall*'s caſe, that the chriſtian religion is part of the law of England.

If the jews may be reconciled to the new teſtament, it ought to have weight; and as they believe a part of the holy ſcriptures, it muſt give them ſuperior credit to perſons who do not believe at all in the ſame manner with us. Suppoſe a chriſtian ſhould turn Gentou, and ſay I am not liable to be indicted, how muſt he be convicted

victed of perjury any more than a perſon who is a Gentou from his birth? perſons of his temper of mind, who are guarded againſt corporal puniſhment, will truſt futurity as to eternal puniſhment.

The admitting a Mahometan before the council, paſſed without oppoſition—but the judges ſit there rather as adviſers, than in any other light. It wants the form of an authority: and there was a caſe before the commons, where a black was rejected as a witneſs. becauſe not of the chriſtian religion.

That an act of parliament is neceſſary to diſpenſe with the form of an oath, appears from the tenth of the late king in relation to the jews; this act being made to diſpenſe with their ſwearing upon the faith of a chriſtian. Therefore if it ſhould be thought proper, for reaſons of ſtate, and for the ſake of trade, to receive ſuch evidence for the future, let it be done by the legiſlature.

The Lord CHANCELLOR, the lord chief juſtice, and lord chief baron, deſired that the cauſe ſhould ſtand over until the enſuing term; and in the mean time that a ſearch ſhould be made in the crown office for precedents of indictments of perjury, to ſee whether in the indictment of a jew it has been laid *tacto libro legis Moſaicæ*, or whether there was any thing particular in the form with regard to the indictments of jews; and as caſes had been mentioned in the admiralty, of heathens being admitted to ſwear in their own form, inquiry to be made in that court.

The cauſe came on for judgment, February 23, 1744. LORD CHIEF BARON, the counſel for the defendant, in ſupport of their objection to the plaintiff's evidence, cited 1 *Inſt.* 6. & 4 *Inſt.* 276. to ſhew *that an alien infidel can be no witneſs.*

If my lord *Coke* had, by an infidel meant, a *profeſſed atheiſt*, I ſhould be of opinion that he could not be a witneſs.

Perſons who profeſs the Gentou religion believe a GOD to be the creator of the world. The generality of mankind believe a GOD. *Tully* "*Quod nulla gens tam fera, nemo omnium tam ſit immanis, cujus mentem non imbuerit*

huerit deorum opinio. De natura deorum. Juſ. Diſput. l. 1. ſe. 13.

As to the Gentou religion, it appears from the beſt teſtimonies, that perſons of this religion do believe in a GOD as the creator and governor of the world. *Relig. Cerem. vol.* 3. *p.* 257, 277, 381. *Tournfort's voyages*, 39, 259.

To ſhew that the old teſtament is the goſpel as well as the new, on one of which the law requires the oath ſhould be adminiſtered, the defendant's counſel cited 2 *Keb.* 314.

To this I anſwer, that the ritual or ceremonial part of the Moſaic law is not binding, but the moral is upon chriſtians; therefore the old teſtament cannot be called the goſpel.

Lord *Hale*'s reaſon is the baſis of my advice. The defendant's counſel ſay, that lord *Hale* miſunderſtood lord *Coke*. In anſwer to this, conſider the third Inſtitutes, and you will find lord *Hale*'s conſequence well founded. 2 *Hale, P. C.* 279. 3 *Inſt.* 165.

Lord *Hale* ſays, "I take it, that although the regular "oath, &c. is *tactis ſacro ſanctis Dei evangelius*, &c. yet "in caſes of neceſſity, as in foreign contracts, &c. "the teſtimony of a jew, *tocto libro legis Moſaicæ*, is not "to be rejected." *Ante* 8.

The books cited by the defendant's counſel, to ſhew jurors or witneſſes muſt be ſworn upon the goſpel, were *Bracton*, *Briton*, *Fleta*, &c. Theſe authors prove no more than that the oaths are adapted to the natives of this kingdom, but, by *Maddox*'s hiſtory of the exchequer, and *Wilkin*'s Saxon laws, it appears that jews were alſo ſworn; and, in the latter author, we find ſomething very particular; a *venire facias* is mentioned to have iſſued to *ſex legales homines*, and *ſex legales judæos*. *Fleta b.* 5. *ca.* 22. *p.* 344. *Bract.* 116. *Brit. ca.* 53. *p.* 135. *Forteſq. de Laud. Leg. Ang. ca.* 26. *p.* 58. *Madd. Hiſt. Exch.* 166. *Wilk. Sar. La.* 348.

A doubt aroſe after the reſtoration in what manner a jew ſhould be ſworn in putting in an anſwer. Upon motion, lord keeper NORTH ordered that he ſhould be ſworn on the pentateuch, and that the plaintiff's clerk

ſhould be preſent to ſee him ſworn. It is likewiſe the conſtant courſe in trials at bar and *niſi prius*; and, which is ſtill ſtronger, there is an act of parliament to enforce it. *Anon.* 1 *Vern.* 263. *Francia's caſe*, 6 *St. Tr.* 68.

This overturns *Coke*'s opinion ſo far as jews are concerned, and eſtabliſhes *Hale*'s.

The next paſſage in *Hale* relates to the ſpecial laws in Spain.

Conſider now whether there is not ſuch a *neceſſity* here as is ſufficient to render this evidence admiſſible.

An objection is made, that the plaintiff ought to have ſhewn he could not have the evidence of *chriſtians*. To this I anſwer, that repugnant to natural juſtice, in the ſtatute of hue and cry, the robbed is admitted to be a witneſs of the robbery, as a moral or preſumed neceſſity is ſufficient: and that it ſhall be taken for granted there was the ſame *neceſſity* in the preſent caſe, as nothing is ſtated to the contrary. Beſides, it appears that the plaintiff did commence a ſuit in Calcutta, and obtained a decree there, and what is very material, *Barker* himſelf, the father of the defendant, in that ſuit, in the mayor's court, inſiſted that *Omychund* ſhould be aſked, whether he was of the Gentou religion, and that he ſhould be ſworn according to his own notion of an oath, which was done accordingly. This certainly bound *Barker*, and of courſe his repreſentative. 2 *Rolls. Rep.* 346. 1 *Salk.* 283.

What ſhould hinder admitting them as witneſſes? they are admitted by the civil law; by the law of nations; by the common conſent of mankind. He then cited all the caſes mentioned by the plaintiff's counſel, and lord *Stair*'s Inſtitute to ſhew the law of Scotland in this particular.

But it is objected, that theſe witneſſes do not ſwear by the *true* GOD; and for this purpoſe the defendant's counſel cited *Deuteronomy*. Thou ſhalt fear the Lord thy God and ſerve him, and ſhalt ſwear by his name. Ye ſhall not go after other gods, of the gods of the people, which are round about. *Ca.* 6. *v.* 13 & 14.

On the other ſide, *Jacob* upon his covenant with *Laban* ſwore by the fear of his father *Iſaac*. *Gen. ca.* 31. *v.* 53.

My

My anſwer is, this is not true in fact, for they do ſwear by the *true* GOD, the creator of the world.

Lord *Hale* ſtates a proviſion by the laws of Spain for moors; and oaths particularly adapted to the religion of the mahometans—but here the oaths taken by theſe witneſſes is the conſtant oath, and taken in their own manner exactly.

Lord *Hale* makes a queſtion, whether a turk or a jew may be admitted to give evidence upon murder. I think a jew a competent witneſs to give evidence upon a murder.

As to the form of the oath, it is not ſo ſolemn or ſignificant as ours. The ſcripture has upon this occaſion been cited, and I will therefore mention the opinion of a very great divine, *Tillotſon*, in his aſſiſe ſermon. The form of an oath is voluntarily taken up and inſtituted by man. 1 *vol.* 194.

In *Dutton*, *v. Colt.* Doctor *Owen*, vice chancellor of Oxford, being a witneſs for the plaintiff, refuſed to be ſworn in the uſual manner, by laying his right hand upon the book, and by kiſſing it afterwards; "but he cauſed the book to be held open before him, "and he lifted up his right hand: the jury upon this "prayed the opinion of the court, if they ought to "think this teſtimony as ſtrong as the teſtimony of ano-"ther witneſs: and GLINN, C. J. told them, that in his "judgment he had taken as ſtrong an oath as any other "witneſs; but ſaid, if he was to be ſworn himſelf, he "would lay his right hand upon the book." 1 *Siderf.* 6.

That forms are various, *Vid. Selden. t.* 2. 1467. *and Voet's Pand.* Chriſtians were ſworn ſometimes without laying their hand upon the goſpel, by lifting up their hands to heaven: jews were firſt ſworn with rites and ceremonies, afterwards without any. It is plain, that by the policy of all countries, oaths are to be adminiſtered to all perſons according to their own opinion, and as it moſt affects their conſcience, and laying the hand was originally borrowed from the pagans.

It is ſaid by the defendant's counſel, that no new oath can be impoſed but by act of parliament, and for

this purpoſe ſeveral caſes were cited. My anſwer is, this is no new oath.

It was objected, that they ought not to be admitted as witneſſes, from the perpetual enmity between heathens and chriſtians, upon the authority of *Calvin*'s caſe, 7 *Coke* 17, *and ſtat.* 21 *Hen.* 8.

This is to be underſtood of ſpiritual diſcord only: ſir *Edward Littleton*, lord keeper, in his readings upon *ſtat.* 27 *Edw.* 3. has ſentiments there worthy of a great chriſtian writer. "Turks and infidels," ſaith he, "are "not *perpetui inimici*, nor is there a particular enmity "between them and us, but this is a common error "founded upon a groundleſs opinion of juſtice *Brooke*; "for though there be a difference between our religion "and theirs, that does not oblige us to be enemies to "their perſons: they are the creatures of GOD, and of "the ſame kind as we are, and it would be a ſin in us "to hurt their perſons." 1 *Salk.* 46.

In *Wells, v. Williams.* The court ſaid, "that the "neceſſity of trade has mollified the too rigorous rules "of the old law, in reſtraint and diſcouragement of "aliens: a jew may ſue at this day, but heretofore he "could not; for then they were looked upon as ene-"mies; but now commerce has taught the world more "humanity; and therefore held that an alien enemy, "commorant here by licence of the king, and under "his protection, may maintain debt upon a bond, "though he did not come with ſafe conduct." 1 *Ld. Raym.* 282.

It was objected that this is a novelty, and that what has never been done ought not to be done.

The law of England is not confined to particular caſes, but is much more governed by reaſon, than by any one caſe whatever. The true rule is,—"Where the law is "known and clear, though it be unequitable and incon-"venient, the judges muſt determine as the law is, "without regarding the unequitableneſs or inconveni-"ency; thoſe defects, if they happen in the law, can "only be remedied by parliament; but where the law "is doubtful and not clear, the judges ought to inter-

"pret

" pret the law to be, as is moſt conſonant to equity, " and leaſt inconvenient." *Vaugh.* 37, 38.

As to *Lee*, v. *Lee*, before the court of delegates, 1692, they gave no opinion whether the witneſſes were admiſſible or not.

The counſel for the defendant mentioned a note of a caſe taken by Mr. *Bunbury*, in the court of exchequer, in a cauſe between the *Eaſt-India* company and admiral *Matthews*, " Where *Orangee*, a black, being offered as " a witneſs there, ſaid he looked upon JESUS CHRIST as " a good man, and upon ſending to the king's bench for " their opinion, they thought he could not be admitted, " becauſe he did not *believe* in JESUS CHRIST."

This was a note of a caſe taken ſome time after the cauſe was heard, upon memory only, which at a diſtance of time is very treacherous: but I think the reaſon a very bad one, for the ſame would exclude the jews.

Another objection is, that the witneſſes are not liable to an indictment for perjury.

This is not true in fact, but ſuppoſing it was, yet this is not the only caſe where witneſſes cannot be proſecuted; for there is no poſſibility of proſecuting them where the depoſitions are taken out of England; but if they were here, I ſhould be of opinion, they might be indicted upon a ſpecial indictment, for I do not think *tactis ſacris evangeliis* are neceſſary words, for ſeveral old precedents are, that the party was *juratus* generally, or *debito modo juratus*. *Weſt's Symb. part* 2. *ſect.* 160.

As to the precedents of indictments againſt jews, they are ſo various that nothing is to be drawn from them. Upon the whole, not to admit theſe witneſſes, would be deſtructive of trade and ſubverſive of juſtice, and attended with innumerable inconveniencies.

WILLES, C. J. C. P. Firſt, as to the general queſtion, whether any infidel may be admitted as an evidence, I am of opinion that ſome infidels may, under ſome circumſtances, be admitted as witneſſes. Lord *Coke* is plainly of opinion, that jews as well as heathens, were compromiſed under the ſame excluſion. Serjeant *Hawkins*, in his *Pleas of the Crown*, is miſtaken in his notion of lord *Coke*'s opinion, long before his

his time, and ever ſince the jews returned to England, they have been conſtantly admitted as witneſſes.

The defendant's counſel are miſtaken in their conſtruction of lord *Coke*; for he puts the jews upon a footing with ſtigmatized and infamous perſons. This *notion* is contrary to religion, common ſenſe, and common humanity. The devils themſelves to whom he has delivered them, could not have ſuggeſted any thing worſe!

Our SAVIOUR and St. *Peter* have ſaid, "*GOD is no "reſpecter of perſons.*" *Acts ca.* 10. *v.* 34. Lord *Coke* is a great lawyer, but our SAVIOUR and St. *Peter*, are in this reſpect, much better authorities than a perſon poſſeſſed with ſuch narrow notions, which very well prove all that lord *Treby* has ſaid of it.

Bracton, *Briton* and *Fleta*, lived in popiſh times, when no other trade was carried on, except the trade of religion. It is very plain too, theſe antient authorities ſpeak only of chriſtian oaths.

Maddox's hiſtory of the exchequer clears it up beyond all contradiction, that jews were conſtantly ſworn; and from the nineteenth year of the reign of *Charles* the firſt to the preſent time, have never been refuſed.

He then oppoſed *Hale* to *Coke*, obſerving, that the former authority was full of the true ſpirit of good ſenſe and chriſtianity—and *decies repetita placebit*.

There was no occaſion to have recourſe to the civil law; and *Coke*'s words in *Calvin*'s caſe, and his 4 *Inſt.* anſwered his own aſſertion: "If an oath was clearly of "a chriſtian inſtitution, then I ſhould be forced to ad-"mit, that it could not be allowed." *Ante* 8.

But oaths are as old as the creation. There are a variety of inſtances in *Geneſis*, in the thirtieth chapter of *Numbers*, and throughout.

The nature of an oath is not at all altered by chriſtianity, but only made more ſolemn, from the ſanction of rewards and puniſhments, being more openly declared. The paſſage in the fourth chapter of St. *Matthew*, relating to *Herod* and the daughter of *Herodias* is very extraordinary; a perſon appears there to be ſo very wicked as not to ſtick at murder; and yet thought an oath of

ſo

ſo ſacred a nature as to chooſe rather to commit the former than break the latter.

Pythagoras in his golden verſes, and *Tully* in ſeveral parts of his works, ſpeak of an oath with the higheſt reverence. *Grotius de jura belli et Pacis.* 1 vol. b. 2. c. 13. *de jurejurando*, 1 ſec. *apud omne: populos, et ab omni ævo circa pollicitationes, promiſſa et contractus, maxima ſemper vis fuit juris-jurandi.*

The form of oaths varies in countries, according to different laws and conſtitutions, but the ſubſtance is the ſame in all.

Grotius, in the ſame chapter, *ſect.* 10. *Forma juris-jurandi verbis differt, reconvenit hunc enim ſenſum habere debet, ut* DEUS *invocetur, puta hoc modo,* DEUS *teſtis ſit aut* DEUS *ſit vindex.* In our old law books, *ſic* DEUS *adjuvet*, and other expreſſions of the ſame nature, and now, *So help me* GOD. See St. *Matt. ca.* 23. *v.* 20, 21, *and* 22.

There is nothing in the argument, that as chriſtianity is the law of England, no other oath is conſiſtent with it. But though *infidels*, who believe in GOD, and future rewards and puniſhments in the other world, may be witneſſes; yet if they do not believe in GOD, or future rewards and puniſhments, they ought *not* to be admitted as witneſſes.

Next, as to diſpenſing with ſtrict rules of evidence: ſuch evidence is to be admitted as the *neceſſity* of the caſe will allow of: as for inſtance, a marriage at *Utrecht* certified under the ſeal of the miniſter there, and of the town, and that they cohabited for two years together as man and wife, was held to be ſufficient proof they were married. *Alſop*, v. *Bowtrele. Cro. Jac.* 541.

It muſt be left to the jury or judge what credit they will give; for it is a known diſtinction, that the evidence though admitted, muſt ſtill be left to the perſons who try the cauſe, to give what credit to it they pleaſe; and therefore the ſame credit ought not to be given to the evidence of an infidel as of a chriſtian; becauſe not under the ſame obligations.

This cauſe relates to a mercantile affair, between *Barker*, a merchant and a ſubject of England, and an Indian

Indian merchant and a ſubject of the great mogul. The plaintiff had but one remedy, he follows his debtor into England. There can be no evidence without oath. It would be abſurd for him to ſwear according to the chriſtian oath, which he does not believe; and therefore out of *neceſſity* he muſt be allowed to ſwear according to his own notion of an oath. *Ca. on Infants, Poſt*

Next as to the commiſſion. The certificate fully anſwers this objection: *that it does not appear they believe in* GOD. Great ſtreſs cannot be laid upon the authors who give an account of the Gentou religion, becauſe it muſt depend upon their veracity and private judgment: but the certificate is ſufficient, which ſays, "the Gentous "believe in a GOD as the creator of the univerſe; and "that he is the rewarder of thoſe who do well, and an "avenger of thoſe who do ill."

On indicting for perjury, he concurred with the chief baron, and was of opinion, on the circumſtances of the caſe, that the plaintiff's witneſſes ought to be admitted.

LEE, C. J. B. R. Agreed, that where it is returned by the certificate that the witneſs *is of a religion*, it is ſufficient; for the foundation of all religion is the belief of GOD, though difficult to have a diſtinct idea of an infinite and incomprehenſible being as GOD is, yet mankind may have a relative idea of the being of a GOD as dependant creatures upon him.

An oath is a religious ſanction that mankind have univerſally eſtabliſhed. He declined declaring how far atheiſts and perſons believing in no religion, may in ſome caſes be admitted; but he apprehended the rules of evidence ought to be conſidered as artificial rules, framed by men for convenience in courts of juſtice, and founded upon good reaſon: but one rule can never vary—the eternal rule of natural juſtice. This caſe ought to be looked upon in that light, and conſidering evidence in this way, is agreeable to the genius of the law of England.

There is not a more general rule, than that hearſay cannot be admitted; nor huſband and wife as witneſſes againſt each other, and yet it is notorious, that from

neceſſity

neceſſity they have been allowed: and not an *abſolute* neceſſity, but a moral one.

Where there are *foreign* parties intereſted, or in commercial matters, the rules of evidence are not quite the ſame as in other inſtances in courts of juſtice. The caſe of hue and cry; a feme covert is not a lawful witneſs againſt her huſband in caſes of treaſon; but has been admitted in civil caſes: a wife admitted to prove a truſt: the ſame as to hearſay evidence. *Brownl.* 47. 1 *Hale, P. C.* 301. *Skinn.* 647. *Ante* 61. *Vide ca. Huſband and Wife.*

As to admitting evidence in foreign matters and commercial, this is different from other caſes. The teſtimony of a public notary, is evidence by the laws of France, and no other witneſs is neceſſary to prove the tranſaction. There can be no doubt, if it came in queſtion, whether this was a valid contract, but a teſtimony from perſons of that credit and reputation would be received as good proof in foreign tranſactions, and would authenticate the contract. 2 *Roll. Rep.* 346. *Cro. Car.* 365.

Theſe caſes ſhew, that courts always govern themſelves by theſe rules, in caſe of foreign tranſactions. In caſes of ſales of goods a factor is admitted as a witneſs. *Preced. in Ch.* 207. *Tremoult*, v. *Dedire*, 1 *P. Will.* 429. *Comberb.* 340, 366. *Dockeray*, v. *Dickenſon*. *Vide Bent*, v. *Baker*. *Ante*

He declined deciding, whether perſons not believing in any religion ſhould not be admitted: but theſe witneſſes being under the religious tie of an oath, adminiſtered in a ſolemn manner; the tranſaction being wholly in the country of the mogul, and as *Barker* had forced the plaintiff to have recourſe here to the law of England, by quitting a country where by the letters patent of the crown, they were intitled to juſtice, it would not be conſonant to natural equity to deny them the benefit of this evidence.

He concluded by ſtating the ſtatute, by which it is provided, a ſeizure or information ſhall be made upon any clauſe or thing contained in the act for increaſing ſhipping and navigation, that then the defendant or de-

ſendants, ſhall on his or their requeſt, have a commiſſion out of chancery to examine witneſſes beyond ſeas, and have a competent time for the return thereof, before any trial ſhall be had upon the caſe, and that the examination of witneſſes ſo returned, ſhall be admitted as evidence in law at the trial, as if it had been given *viva voce* by the examinate in court; any law, ſtatute, or uſage to the contrary in any wiſe notwithſtanding. 13 *and* 14 *Car.* 2. *ca.* 11. *ſect.* 20. *Vide Poſt*

Lord HARDWICKE, Chan. *Firſt*, as to the objection to the certificate and return of the commiſſion, "That "the commiſſioners have not followed the directions of "this court; that they ſhould have certified of what "religion the witneſſes were, and the principles of that "religion; whereas they only certify them to be of the "Gentou religion, without ſhewing what the principles "are of that religion:" it was not the intention of the courts they ſhould, for it would have been entering into a wide field, and would have been certifying the hiſtory of the Bramin or Gentou religion.

Caſes have been determined at common law upon evidence taken from hiſtories of countries, and we have very authentic accounts of this part of the world. A general hiſtory is evidence to prove a matter relating to the kingdom in general. 1 *Salk.* 281.

My intention was to be certified, whether theſe people believed the being of a GOD and his providence. *Churchill's* voyages particularly deſcribes this religion, and their precepts of morality; the latter precept carries almoſt the ſenſe of the ninth commandment.

This objection being removed, the next queſtion will be—whether the depoſition ought to be read; which depends upon two things. *Firſt*, Whether it is a proper obligatory oath. *Secondly*, Whether on the ſpecial circumſtances in this caſe, ſuch evidence can be admitted according to the law of England.

Juris juramentum, eſt affirmatis religio ſa: all that is neceſſary to an oath is an appeal to the ſupreme being, as thinking him the rewarder of truth and avenger of falſehood. *Biſh. Saunderſon de juris-juramenti obligatione p.* 5. *and* 18.

This

This is not contradicted by any author but lord *Coke*, who has taken upon him to infert the word *chriſtian*, and is the only writer who hath ingrafted this word into the oath. As to other writers they are all concurring. Dr. *Tillotſon*, upon the lawfulneſs of oaths ſays, where the very text ſpeaks plainly of an oath among all nations and men, "An oath for confirmation is to them an end "of all ſtrife. The neceſſity of religion to the ſupport "of human ſociety, in nothing appears more evidently "than in this, that the obligation of an oath, which is "ſo neceſſary for the maintenance of peace and juſtice "among men, depends wholly upon the ſenſe and be-"lief of a deity." *Puffend. lib.* 4. *ca.* 2. *ſect.* 4. *Heb.* *ca.* 6. 16 *v.* *Tillotſ. Serm. vol.* 1. 189.

Next, as to the form of the oath. It is laid down by all writers, that the outward act is not eſſential to the oath; *Saunderſon* is of that opinion, and ſo is *Tillotſon* in the ſame ſermon. "As for the ceremonies in uſe "among us in the taking of oaths, it is no juſt excep-"tion againſt them, that they are not found in ſcrip-"ture, for this was always matter of liberty, and ſeve-"ral nations have uſed ſeveral rites and ceremonies in "their oaths." 1 *Tillotſ. ſerm.* 144.

All that is neceſſary appears in the preſent caſe; an external act was done to make it a corporal oath.

Secondly, Whether upon ſpecial circumſtances ſuch evidence may be admitted according to the law of England? there is but one general rule of evidence—*the beſt that the nature of the caſe will admit.* *Vide poſt. B.* 2. *ca.* 1.

The *rule* is, that if writings have ſubſcribing witneſſes to them, they muſt be proved by thoſe witneſſes. The firſt ground judges have gone upon in departing from ſtrict rules, is an abſolute ſtrict *neceſſity*. Secondly, a *preſumed neceſſity*. In caſe of writings ſubſcribed by witneſſes, if all are dead the proof of one of their hands is ſufficient to eſtabliſh the deed: where an original is loſt, a copy may be admitted; if no copy, then a proof by witneſſes who have heard the deed, and yet it is a thing the law abhors, to admit the memory of a man as evidence. 1 *Mod.* 4.

A tradeſman's books are admitted as evidence, though no *abſolute* neceſſity, but reaſon of a *preſumption* of neceſſity only, inferred from the nature of commerce.

As to admitting *hearſay* evidence, ſee the caſe of *Campoverdi, Mich.* 2 *Anne*, in an action upon a policy of inſurance. There is another inſtance of diſpenſing with a lawful oath, where our courts admit evidence for the crown without oath.

It is a common natural preſumption, that perſons of the Gentou religion ſhould be principally apprized of facts and tranſactions in their own country: there is a ſtronger preſumption of *neceſſity* here than for admitting a deed of thirty years ſtanding; beſides all this, an additional reaſon is, that the parties who entered into this contract preſumed, that if they ſhould be obliged to ſue, it would be in their own country, and, then they muſt have been admitted. From hence it follows, that if one of the parties ſhould leave this country and change his domicil, the other would be deprived of his evidence, which would have been admitted there, and by that means deprived of juſtice.

As the Engliſh have only a factory in this country, for it is in the empire of the great mogul, if we ſhould admit this evidence, it would be agreeable to the genius of the Engliſh law. The courts of admiralty have done it.

In *Beake, v. Tyrrel.* An Engliſh ſhip was taken by a French man of war, under colours of a Dutchman, and carried into France, and there condemned as a Dutch prize. Afterwards an Engliſh merchant bought this ſhip of the French and conveyed her into England, where the right owner brought an action of trover for the ſhip againſt the purchaſer; and all this matter being found ſpecially, the defendant had judgment, becauſe the ſhip being legally condemned as a Dutch prize, this court will give credit to the ſentence of the court of admiralty in France, and take it to be according to right, and will not examine their proceedings; for it would be very inconvenient, if one kingdom ſhould by peculiar laws, correct the judgments and proceedings of another kingdom. *Carth.* 31.

If

If *we* did not give this credence, courts abroad would not allow our determinations here to be valid.

So in matrimonial caſes, they are to be determined according to the ceremonies of marriage in the country where it is ſolemnized.

So ſuppoſe a heathen, not an alien enemy, ſhould bring an action at common law, and the defendant ſhould bring a bill for an injunction,—would any body ſay that the plaintiff at law ſhould not be admitted to put in an anſwer, according to his own form of an oath? If otherwiſe, the injunction muſt be perpetual, and this would be a manifeſt denial of juſtice.

As to the moſt material objection of the form of indictments for perjury, the words *ſupra ſanctum DEI evangelium*, are not at all neceſſary. Framers of indictments are apt to throw in words, and ſwell them out too much to no purpoſe; therefore the old precedents are the beſt; and, as has been ſaid, this would prove too much, for it would hold as well to all depoſitions taken abroad.

It has been ſaid by the counſel for the defendants, that the ſpecial law of Spain for taking thoſe oaths, are of the nature of our acts of parliament. It is otherwiſe. *Selden*, upon the laws of *Alphonſo*, the wiſe king of Arragon, ſaith, it is not a poſitive law for the moors, but authenticated by him, and transferred into his code of laws, and originally of the nature of what our common law is. Moors have their particular oath, which they ought to make in that manner. This form of expreſſion rather ſhews that he refers to ſome other law that prevailed long before.

This falls in exactly with what lord *Stair*, *Puffendorf*, &c. ſay, that it has been the wiſdom of all nations to adminiſter ſuch oaths, as are agreeable to the notion of the perſon taking, and does not at all affect the conſcience of the perſon adminiſtering, nor does it in any reſpect adopt ſuch religion: it is not near ſo much a breaking in upon the rule of law, as admitting a perſon to be a witneſs in his own cauſe.

As to the caſe of the *Eaſt-India* company, *v.* admiral *Matthews*. I was counſel in the cauſe, but do not remember

remember ſending either to the court of king's bench or common pleas for their opinion. Mr. *Bunbury* has ſtated it as a trial at bar, before lord chief baron *Reynolds*, and therefore it could not be done, for there is no ſuch thing as ſending one judge out of a court to the judges of another upon a point of evidence. As to the caſe before lord chief baron EYRE, the perſon there would not be ſworn either upon the old or new teſtament, and therefore as he was not a *chriſtian* he would not admit him to be a witneſs. But upon the ſpecial circumſtances of this caſe, I concur in opinion with my lords the judges, that the depoſitions of theſe witneſſes ought to be read as evidence in this cauſe, and do therefore order that the objection be over-ruled and the depoſitions read. 1 *Atkyns* 21. 1 *Wilſ.* 84. *S. C.*

In a caſe before the council, on the 9th of December, 1738, it appears that ſir *John Strange* had conſidered of the principle on which the caſe of *Omichund*, v. *Barker*, was determined: for he reports, that on the complaint of *Jacob Fachina*, againſt general *Sabine*, as governor of *Gibraltar*, *Alderman Ben Mouſo*, a *moor*, was produced as a witneſs, the two chief juſtices being preſent, and was ſworn upon the koran; and he did not object to it. 2 *Strange* 1104.

So in ATCHESON, *v.* EVERIT, *Hil.* 13 *Geo.* 3. *B. R.* action upon *ſtat.* 2 *Geo.* 2. *ca.* 24. *ſect.* 7. againſt bribery.

On motion for a new trial. Earl MANSFIELD declared, that the judgment in *Omichund*, v. *Barker*, had his approbation: for he ſays, "I argued, and the judges "there agreed, that upon the principles of the common "law, there is no particular form eſſential to an oath "to be taken by a witneſs: but as the purpoſe of it is "to bind his conſcience, every man of every religion "ſhould be bound to that form which he himſelf thinks "will bind his conſcience moſt. Therefore, though "the chriſtian oath was ſettled in very early times, yet "*jews* before the 18 *of Edw.* 1. when they were ex-"pelled the kingdom, were permitted to give evidence, "and were ſworn, not on the evangeliſts, but on the "old teſtament: and no diſtinction was taken between "their ſwearing in a *civil* and *criminal* caſe."

So

So a *turk* or *mahometan* may be ſworn on the alcoran. As in the KING, *v.* JOHN RYAN, and others, *Old-Bailey, December ſeſſions*, 1764. The priſoners were indicted before ADAMS, B. and WILMOT, J. for ſtealing ſeveral articles the property of *John Morgan*, in the dwelling-houſe, &c.

John Morgan, the proſecutor, appeared to be a *mahometan*. The priſoners were therefore remanded in order to take the opinion of the JUDGES, whether a *mahometan* could be permitted to ſwear on the *alcoran*, in a proſecution for a capital offence?

GOULD, J. In February ſeſſion, 1765, delivered it as the unanimous opinion of the judges, that he might be ſworn.

An *alcoran* was accordingly produced. The witneſs firſt placed his right hand flat upon it; put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head: he then looked for ſome time upon it; and being aſked what effect that ceremony was to produce, he anſwered, that he was bound by it to ſpeak the truth. The priſoners were found guilty of ſtealing, but not in the dwelling houſe. 3 *Leach's Cr. Ca.* 3 *edit.* 64. *Comp.* 390.

Rule the Third.

But an *atheiſt*, who profeſſes to have no belief in the exiſtence of a GOD; and of courſe diſbelieves a future ſtate of rewards and puniſhments, cannot be a witneſs.

For, perſons denying the divine being and attributes of the Deity, cannot conſider themſelves bound by the obligation of an oath, and therefore not deſerving credit are incompetent. *Bull. N. P.* 192. 1 *Atk.* 45. *Ante* 64, 72.

Rule the Fourth.

So a perſon having no idea of a GOD or religion, who is altogether ignorant of the obligations of an oath, the exiſtence of another world, and a future ſtate of rewards and puniſhments, ought not to be ſworn.

As

As in the KING, *v.* WHITE, *Old-Bailey, October ſeſſions*, 1786. Indicted for horſe-ſtealing.

Thomas Atkins was produced as a witneſs. He ſaid, on being examined on the *voire dire*, that he had heard there was a GOD, and believed that thoſe perſons who told lies would come to the gallows: but he acknowledged that he had never learned the catechiſm, was altogether ignorant of the obligation of an oath, a future ſtate of rewards and puniſhments, the exiſtence of another world, or what became of wicked people after their death.

The court rejected him as being incompetent to be ſworn; for that an oath is a religious aſſeveration and imprecates the vengeance of heaven, if the witneſs does not ſpeak the truth; and therefore a perſon who has no idea of the ſanction which this appeal to heaven creates, ought not to be ſworn as a witneſs in a court of juſtice. *Leach's Cr. Ca.* 2 *edit.* 337. 3 *Edit.* 483. *Ante*

NOTE. Where the objection to competency is grounded on the *infidelity* of the perſon produced to be ſworn, the proper queſtion to be aſked, is not whether he believes in JESUS CHRIST, or in the *holy goſpels of* GOD, but whether he believes in GOD, the obligation of an oath, and a future ſtate of rewards and puniſhments. *Vide poſt. ca. which treats on ſelf-accuſation. Peake's Rep. of caſes at N. P.* 11. *Ridgeway's Rep. of Leary's tri. Poſt*

Rule the Fifth.

Diſſenters from the church of England, as by law eſtabliſhed, may be ſworn according to the form and ceremony of their own particular ſect.

As in COLT, *v.* DUTTON, *Mich.* 1657, *B. R.* Dr. Owens, vice chancellor of Oxford, being called as a witneſs, refuſed to kiſs the book; but deſired it might be opened before him, and he lifted up his right hand. The jury prayed the opinion of the court, if they ought to give the ſame credit to him as to a witneſs ſworn in the uſual manner.

GLYNN, C. J. told them, that in his opinion he had taken as ſtrong an oath as any other witneſs. "But," ſaid

ſaid he, "if I were to be ſworn, I would kiſs the book." 2 *Siderf.* 6. 1 *Atkyns* 31. *S. C. Atcheſon, v. Everit Cowper* 390. *S. C. Ante* . *S. C.*

So in the KING, *v.* CHRISTIANA FITZPATRICK, *Old-Bailey ſeſſions, February* 1786, Indictment for larceny.

David Milbourne, Scotch covenanter, was produced as a witneſs, who ſtated to the court that he was a North-Britain, and that the way of ſwearing in Scotland was not to kiſs the book.

GOULD, J. ſaid, that on the trial of the rebels at Carliſle, in 1745, finding it to be the ceremony of a particular ſect, he admitted a witneſs to ſwear, by the form of holding up his hand, without touching the book or kiſſing it, and that he afterwards referred the caſe to the twelve JUDGES, who determined that the witneſs was legally ſworn.

Upon the authority of this caſe, *David Milbourne* was ſworn in the following form. "You ſwear according "to the cuſtom of your country and the religion you "profeſs, that the evidence you ſhall give between our "ſovereign lord the king and the priſoner at the bar, "ſhall be the truth, the whole truth, and nothing but "the truth." *Leach's Cr. ca.* 2 *edit.* 399. 3 *Edit.* 459.

Lord *George Gordon*, before he turned jew, was ſworn in the ſame manner, exhibiting articles of the peace in the king's bench. *MS.*

Lord MANSFIELD cites the above caſe of the rebels as law. *Atcheſon*, v. *Everitt. Cowp.* 390.

On the trial of the rioters, ſtiling themſelves "*The* "*Proteſtant Aſſociation*," at *St. Margaret's-hill, Surry*, 1780.

Sylveſter, for the priſoners, deſired that ſome Iriſh Roman catholics who appeared as witneſſes ſhould be ſworn on a new teſtament with a crucifix, or croſs on it; and ſaid, he was well informed, that perſons of their perſuaſion were ſo ſworn in Ireland by the magiſtrates, and in the courts of juſtice.

EYRE, B. Denied that ſuch a cuſtom could exiſt: and ordered the witneſſes to be ſworn in the uſual way. *MS.* In the aſſertion the counſel was right—in the denial of the cuſtom the judge was wrong.

Rule the Sixth.

Perſons excommunicated cannot be witneſſes, becauſe by the laws of the church, ſuch perſons are excluded from human converſation. *Bull, N. P.* 292. 3 *Blackſ. Com.* 102.

The church laws go ſtill further: they excommunicate ſuch as converſe with thoſe who are excommunicated, and conſequently they cannot be examined in a court of juſtice. Beſide, the *church* holds that thoſe who are excluded from her pale are not under the influence of any religion.

When the ſeveral cauſes of excommunication excluſively recited by the ſtatute are conſidered, it is impoſſible not to be ſurprized that they remain as unrepealed exceptions to the competency of teſtimony.

Firſt is *Hereſy*, which whatever it may mean, implies a ſenſe of religious obligation, and of conſcientious acceptance of chriſtianity itſelf, as divinely revealed. Here then does it preſume a man to have no regard to the uttering of an injurious falſehood in the preſence of the Deity, and in repugnance to that religion, the truth and authority of whoſe general doctrine he admits.

Second is *Error* in opinion in matters of religion and doctrine, received and allowed in the church of England. Now if the church of England were really infallible, it would be a misfortune to differ from her in any point, but certainly no ground of civil incapacity, eſpecially ſo as to preclude a court of juſtice from being informed by a perſon labouring under that misfortune.

Third *Simony*. This tranſgreſſion, conſidered as a corrupt trafficking, may indeed affect the credit of a witneſs, though the offence is conſtituted ſo ſtrangely, that eccleſiaſtical right and wrong upon this ſubject enter commonly in a manner extremely perplexing to a lay imagination, ſhould it attempt to define the principles of morality or ſenſe by which the boundaries have been ſettled.

Fourth *Uſury*.

Fifth,

Fifth, *Incontinence*, under which cenſure anti-nuptial commerce, or ſimple fornication was until very lately included, though the party ſhould have made the *amande honorable* by intermarrying, as if being unguardedly awake to the impreſſion of nature, demonſtrated an inſenſibility to the influence of truth. *Vide* 27 *Geo.* 3. *ca.* 24.

Sixth, *Perjury* in an eccleſiaſtical court, cloſes the catalogue. And this under due conviction in the courts of common law, forms, and juſtly, a deciſive exception to the competency. But if communication take placē on this as an eccleſiaſtical charge, this extenſive civil conſequence is thus anticipated by ſentence of a *forum*, whoſe rules of evidence are far different from thoſe of the common law. *Vide ſtat.* 5 *Eliz. ca.* 23. *Morgan's Brit. Lib.* 215. *Lond.* 1766. *Gilb. Evid. by Loft* 262.

Rule the Seventh.

"Every *popiſh recuſant* convict, ſhall ſtand to all intents and purpoſes diſabled, as a perſon lawfully excommunicated." *Stat.* 3. *Jac.* 1. *ca.* 5.

Lord COKE, on the authority of this ſtatute, refuſed to admit a popiſh recuſant a witneſs, between party and party. And,

In the KING, *v.* MERVIN, lord AUDLEY, anno 1631, tried for a rape, &c. before the lords: *Laurence Fitzpatrick* was produced; but, before his examination was read, the earl deſired that neither he nor any other might be allowed as witneſſes againſt him, until he had taken the oath of allegiance.

This was referred to the JUDGES, who reſolved that they might be witneſſes, unleſs they were convicted recuſants. 2 *Buſt.* 155, 156. 1 *St. Tr.* 392.

HAWKINS, obſerving on the rule laid down by *Coke*, ſays, this is too ſevere, and that the purport of the ſtatute is ſatisfied by the diſability to bring an action; for that this, like all other penal ſtatutes, ought to be conſtrued ſtrictly, in limitation of the penalty. 2 *Hawk. P. C. ca.* 46.

This obſervation is founded in ſound ſenſe and legal policy, a diſability introduced againſt a party, though by act of parliament, ought not by the force given to any of the general terms, produce a failure in the courſe of public juſtice. The perſon may be diſabled as to any intereſt of his own, but the competency of teſtimony is an intereſt of ſociety.

Rule the Eighth.

By ſtatute, the *affirmation* of a quaker, therein deſcribed, ſhall be accepted: but it is alſo enacted by the ſame ſtatute, that "No quaker, nor reputed quaker, "ſhall by virtue thereof, be qualified or permitted to "give evidence in any criminal cauſes, &c." *Stat.* 7 & 8 *W.* 3. *Iriſh.* 19 *Geo.* 2. *ca.* 18. *ſect.* 1, 2. 3 *Stat. at large, v.* 5. 777.

On this rule it has been determined,

That a quaker's teſtimony on his *affirmation*, is admiſſible in an action of debt, on *ſtat.* 2 *Geo.* 2. *ca.* 24. *againſt bribery.*

ATCHESON, *v.* EVERIT. Motion for a new trial, becauſe a *quaker* had been received as a witneſs on his *affirmation*, and it was objected that this being a *criminal cauſe* his evidence ought not to have been received.

Lord MANSFIELD, C. J. in delivering his opinion, ſaid, that the queſtion was of high importance, both as to all the quakers in the kingdom, and to the general adminiſtration of juſtice. That when the ſtatute was made, the affirmation of a quaker, in his opinion, ſhould have been put on the ſame footing as an oath in all caſes whatſoever; and he ſaw no reaſon againſt it, for the puniſhment of the breach of it is the ſame. But even the indulgence they enjoy was obtained with much difficulty; for the legiſlature formerly looked upon nonconformiſts as criminals, and quakers in particular as obſtinate offenders; but the more generous and liberal notions of the preſent times, do not look upon real ſcruples in the light of an offence. The ſtatute was made for the eaſe of quakers; they were ſafe where the attorney-general could controul, but needed ſecurity from

from the perſecution of individuals. In this act, however, there is an exception to their being admitted as *witneſſes in criminal cauſes*, and ſerving on juries. The queſtion therefore is, what the ſtatute means by the words *criminal cauſes*. Great ſearch has been made for precedents, and the reſult of the caſes found is, that the courts of late years have, in favour of the quakers, relaxed their former ſeverity. Their affirmation has been received in the caſe of an appointment of overſeers. So in the caſe of an attachment againſt a quaker himſelf. The *King*, v. *Turner*. 2 *Strange* 1219.

No caſe has been found in which it has been refuſed where the action, though in *form of a criminal action*, in *ſubſtance* is a mere action between *party* and *party*. There was a refuſal on the ſtatute of hue and cry, but the ground was, that the quaker could not lay a foundation of the action without an *affidavit*. 27 *Eliz. ca.* 13. *ſect.* 11.

In caſes where an action and an indictment both lie for the ſame act, as in aſſault, impriſonment, fraud, &c. a quaker is an admiſſible witneſs in the action, though not on the indictment.

It is a material circumſtance, that actions for *penalties* are to a variety of purpoſes conſidered as *civil ſuits*—they may be amended at common law. To be ſure the action in this caſe is not only given to recover a penalty, but it is attended likewiſe with *diſabilities*. Therefore it partakes much of the nature of a criminal cauſe. Moreover, the offence itſelf is not merely *malum prohibitum* by ſtatute, but it was indictable at common law.

But on general principles, the affirmation of a *quaker* ought to be admitted in all caſes, as well as the oath of a *jew* or a *Gentou*, or any other perſon who thinks himſelf really bound by the mode and form by which he atteſts. 1 *Atkyns* 21. *Ante* 63.

After the ſecond argument his lordſhip added. That the experience of eight and twenty years, from the reſtoration to the time of the revolution, ſhewed that the obſtinacy of quakers in refuſing an oath, was not merely a pretence or colour given to right and wrong but that it was a *ſcruple*; and, that the ſect was ready to go through all

79093

all kind of ſuffering in the pertinacious adhering to it. A more liberal way of thinking prevailed after the revolution; the principles of toleration were explained and juſtified, in conſequence of the writing of Mr. LOCKE, lord SOMERS, and other great men of theſe times; and a ſtatute paſſed, which though not general, was very extenſive in the relief it afforded to ſcrupulous conſciences, called the *toleration act*. 1 *Will. & Mary*, *ca.* 18.

The tenth ſection of that ſtatute, enables quakers to give aſſurance of their fidelity and allegiance to the ſtate, by *form of oath*, different from that preſcribed by the law of England to chriſtians. It is a form of oath, becauſe it is appealing to the DEITY for the veracity of what they ſhall ſay, and invoking his vengeance if they utter what is falſe. *Ante* 63. 1 *Atk.* 21.

In ſix years after another ſtatute, 7 & 8 *Will.* 3. *c.* 34. allowed a quaker to *affirm*, in caſes where other perſons are required to take an *oath*. He then ſtated the caſe of *Omichund* and *Barker*; and 2 *Siderfen* 6. Dr. *Owen's* caſe. *Ante* 63. And the determination in the *caſe of the rebels at Carliſle*, 1745. *Ante* 47.

Now all perſons examined in criminal caſes, muſt be examined on oath, both for and againſt the crown—therefore if a *quaker* be indicted, he cannot have the benefit of a quaker's teſtimony. *Stat.* 1 *Anne ſt.* 2. *c.* 9. *ſect.* 3. *Iriſh ſtat.* 19 *Geo.* 2. *ca.* 18. *ſec.* 3. *Ante* 100.

And concluded by delivering the opinion of the COURT to be, that the preſent was *not* a criminal cauſe, and therefore that Mr. Juſtice NARES did perfectly right in admitting the *quaker* to be a witneſs upon his AFFIRMATION. *Cooper* 382 *to* 394.

Rule the Ninth.

By this ſtatute a quaker is not an admiſſible witneſs upon making an *affirmation* upon an *appeal of murder*.

As in CASTELE, *widow*, v. BAMBRIDGE and CORBET. *Bambridge* having been proſecuted, on the report of a committee of the houſe of commons, for the murder of the plaintiff's huſband, who had been a priſoner in the

Fleet,

Fleet, under his cuſtody as *Warden*, and having been acquitted the widow brought an appeal. The trial came on at *Guildhall*, before the *chief* JUSTICE, *ſittings*, *Trinity* 3 *Geo.* 2. and the appellant's counſel called a *quaker*, and inſiſted that this is a *civil caſe*, in which he might be a witneſs. But the *chief* JUSTICE ſaid, it was to this purpoſe a criminal proceeding, and therefore he could not be a witneſs. 2 *Strange* 857.

Rule the Tenth.

Neither is a quaker a competent witneſs on a motion for an *attachment* for not performing an award.

As in ROBINS, *v.* SAYWARD. The COURT cannot ground an attachment for non-performance of an award, on the affirmation of a quaker, for though it be in a ſuit between party and party, yet it is a criminal proſecution within the proviſo of *ſtat.* 7 & 8 *Will.* 3. *ca.* 34. *Vide Howel*, v. *Walker*. *Barnard*, *K. B.* 145. *Vide Rex.* v. *Bell*. *Saund.* 200.

Rule the Eleventh.

Nor is a quaker's evidence admiſſible on a motion for an *information* for a miſdemeanor.

As in the KING, *v.* GARDNER. The affirmation of a quaker was offered in exculpation of the defendant, in ſhewing cauſe why an information ſhould not be granted againſt him for a miſdemeanor. This being objected to, The COURT held, that a quaker's affirmation could not be read in *ſupport* of a criminal charge. But they thought that an affirmation might be read in *defence* of a criminal charge, if the perſon charged was *himſelf* a quaker, in order to exculpate himſelf. And in this *third* caſe of a quaker's collateral evidence, in aſſiſtance of the exculpation of another perſon, where the quaker himſelf was not charged, they thought his affirmation *ought not* to be read. 2 *Burr.* 1117. *Vide Rex*, v. *Wych*, 2 *Strange* 872, 946, 1219.

Rule the Twelfth.

Nor can an affirmation be taken on exhibiting articles of the peace.

As in the KING, *v.* GREEN. On motion to exhibit articles of the peace on behalf of *Elizabeth Collet*, a quaker; ſhe refuſing to ſwear, the COURT ſaid they could do nothing. 1 *Stra.* 527.

Rule the Thirteenth.

The reſult of the deciſions cited, gives this general * rule—that where the form is *civil*, though the ſubject may be *penal*; or where the form is *criminal* but the object a *civil* remedy, the evidence of a quaker ſhall be admitted: being excluded in proper *criminal* cauſes, where the *form* and the *object* both denominate the ſuit, a proſecution for a public offence.

* In CHRISTOPHER LOVE's caſe, before the high court of juſtice, Mr. *Jaquel* refuſing to be ſworn, he was fined five hundred pounds; and the oath being afterwards read to him, but without his taking the book, for he laid his hand upon his buttons, on his ſaying he conſidered himſelf ſworn and under oath, he was examined. 1 *St. Tr.* 114.

CHAPTER IX.

Of Perſons who are or may be conſequentially affected by the event of the proſecution, and the diſtinction between intereſt and influence; competency and credit.

☞ This chapter ſhould have preceded the laſt, being naturally connected with the ſubject of it.

Rule the Firſt.

Not only a perſon *immediately*, but a perſon *conſequentially* intereſted in the event of a cauſe, has been held incompetent to give teſtimony. 2 *Hawk. Pl. Cr. ca.* 46.

In the three following caſes this rule will appear to have been ſtrictly adhered to.

1ſt. The KING, *v.* WHITING, *Mich.* 10 *Will.* 3. *N. P. Banc. Reg.* information againſt defendant for a cheat. The fact was, that by ſlight he changed a promiſſory note obtained from his mother-in-law, from ten to one hundred pounds.

HOLT, C. J. rejected the mother-in-law's teſtimony, becauſe ſhe was concerned in the ſuit, which was a means to diſcharge her from the hundred pounds. For though the verdict in the proſecution could not be given in evidence in an action upon the note, yet it would be heard of and influence the jury. And he could not diſtinguiſh this from the caſes of perjury or forgery, where the party whoſe intereſt is defeated or prejudiced, by the forged inſtrument, &c. is no witneſs to prove the perjury or forgery. 1 *Salk.* 283. 1 *Lord Raym.* 396. *S. C.*

2d. The KING, *v.* NUNEZ, *Eaſt.* 9 *Geo.* 2. *Banc. Reg.* perjury in an anſwer in the exchequer. The plaintiff in equity was called to prove the perjury aſſigned, on the authority of *Paris's caſe*, 1 *Vent.* 49. 1 *Siderf.* 431. and the *King*, v. *Moiſe*, 1 *Str.* 595. (where on an indictment for tearing a note, the proprietor of the note was admitted to prove the tearing.) But the chief juſtice ruled, that the plaintiff could not be a witneſs, and cited

the *King*, v. *Whiting*: obſerving that *Paris*'s caſe was againſt *Twiſden*'s opinion. 2 *Stra.* 1043.

3*d.* The KING, v. ELLIS, *Mich.* 12 *Geo.* 2. *Banc. Reg.* indictment for perjury, in evidence given on a trial of an ejectment; the chief juſtice refuſed to let any of the defendants in the ejectment, againſt whom the verdict was given, be examined as witneſſes for the proſecution. And it was ſaid to be ruled ſo on conference with all the judges. 4 *Geo.* 1. The *King*, v. *Newens*.

In the following caſes the ſtrictneſs of the rule is relaxed, and a diſtinction laid down between *intereſt* and *influence*, which has been adopted with full approbation in all the courts of England and Ireland—

The KING, v. BROUGHTON. *Eaſt.* 18 *Geo.* 2. *Banc. Reg.* perjury. *Wharram*, employed the defendant's brother *James*, to ſell an eſtate for him that lay at a diſtance, whom *Wharram* charged to have ſunk ſeven hundred pounds of the purchaſe money, and filed a bill and obtained a decree for an account, upon the foot of an impoſition. After this *Broughton* having pretended to have found a written account, wherein he had given *Wharram* credit for ſeven hundred pounds, reheard the cauſe and examined the defendant. The defendant ſwore that the account was ſent to him by his brother into *Yorkſhire*, to ſhew *Wharram*, which he did; and *Wharram* owned it to be his hand, and declared he had forgot it.

The CHANCELLOR was of opinion, this account was a forgery, and therefore did not vary his decree: but recommended the proſecution of *James*, who thereupon ran away. *Wharram* then indicted the defendant for perjury, and offered himſelf as a witneſs.

Strange for the priſoner, objected to *Wharram*'s competency, on the authority of the *King*, v. *Nunez*, the *King*, v. *Ellis*, and the *King*, v. *Whiting*. *Ante* 105, 106.

KING, C. J. declared he was for hearing the evidence of *Wharram*, becauſe, as no bill of exceptions would lie, the proſecutor would otherwiſe be without remedy; whereas the defendant, if convicted, might move for a new trial: but ſaid he would give no opinion at preſent, further than obſerving, that in *Nunez*'s caſe the ſuit in the

the exchequer was *then depending*; whereas the ſuit here in equity ſeemed to be at an end.

Whereupon *Wharram* was examined, and contradicted the defendant in all the parts of his examination; but being only a ſingle witneſs on the part of the perjury he was acquitted. 2 *Stra.* 1229, 1230.

In the KING, *v.* MAGARRY, *commiſſion of oyer and terminer, Dublin, February* 1795; this diſtinction between a ſuit depending and a ſuit determined, as cauſe for admitting or rejecting a witneſs was taken by the court.

The defendant was indicted for perjury, in an anſwer to a bill filed in the exchequer.

Mac Nally objected to the competency of a witneſs produced to prove the perjury;—on the *voir dire*, he acknowledged that he was plaintiff in the cauſe in equity, and believed he had, as plaintiff in equity, an intereſt in the conviction of the defendant for perjury: on which CHAMBERLAIN, J. refuſed to receive his evidence. *MS.*

And *Vide* lord MANSFIELD's definition of *credit*, in its legal acceptation. *Poſt. Rule* 2. *and p.* 108. *Wyndham, v. Chetwynd. Ante* 15, 16.

Rule the Second.

Where the objection goes to the *intereſt* of the witneſs, it affects his *competency*: where it goes to *influence*, it affects his credit.

Rule the Third.

Where the matter from which the objection reſults is doubtful, it goes only to his credit.

Rule the Fourth.

The queſtion in a criminal proſecution, being the ſame with a civil cauſe, in which the witneſs is intereſted, goes generally to the credit.

Rule the Fifth.

Where the proceedings *cannot* be given in evidence to recover againſt the witneſs in another cauſe, the objection generally is to the credit only.

As in ABRAHAM's *qui tam*, v. BUNN, *Trinity* 8 *Geo.* 3. *Banc. Reg.* the deciſion in the *King*, v. *Broughton*, was recognized as law, and the court drew a legal diſtinction between objections which affect *competency*, and thoſe which affect *credit*.

It was an action for an uſurious contract, tried before lord MANSFIELD, at Guildhall: and a verdict found for the plaintiff. Upon which a motion had been made on the part of the defendant for a new trial, and a rule granted to ſhew cauſe.

The motion was founded upon the *incompetency* of the plaintiff's witneſs.

Benjamin Abraham, the witneſs, was the borrower of the money, and was called on the part of the plaintiff, to prove the uſurious contract.

He proved the defendant to be a pawnbroker, and that he had pledged ſeveral jewels with him on ſeveral loans, ſome of which were redeemed: and he owned that this pledge had been returned, on the money borrowed on it being paid. The contract was proved by him to be uſurious; and he proved it as charged in the declaration.

At the trial, after this man had given his whole evidence it was objected, that he could not be a competent witneſs, unleſs the repayment of the money was proved, and that he himſelf was not competent to prove the repayment of it.

Lord MANSFIELD, C. J. This was a motion for a new trial; becauſe *Benjamin Abraham*'s, ſaid to be an *incompetent* witneſs, was examined and his evidence left to the jury.

It was a *qui tam* action upon the ſtatute againſt uſury. All the counts charge "that the defendant took, ac-"cepted, and received, from *Benjamin Abraham*'s, the "ſum of ſo much money, by way of corrupt bargain "and loan, for his forbearing and giving time of pay-"ment, from ſuch a day to ſuch a day of the ſum ac-"tually lent."

There was no count as to any bond, aſſurance, or contract, whereupon or whereby uſury was reſerved or taken.

At

At the trial *Benjamin Abraham*'s was examined for the plaintiff; and ſwore that the defendant was a pawnbroker; that he borrowed from the defendant ſeveral ſums of money (ſpecifying the time and ſums) upon pawns (ſpecifying them and their value) which were always more than double the value of the money advanced.

He ſwore to his having redeemed the pawns, ſpecifying the times, and that the defendant before he would re-deliver the pawns, took and inſiſted upon the ſums mentioned in the declaration, over and above the principal; which the witneſs paid, together with the principal, and received back his pawns.

He proved no bond or aſſurance of contract for uſury, at the time of the loan; or for repaying the money; nor was any ſuch additional ſecurity neceſſary, becauſe the pawn, which was double the value of the debt, was the ſecurity, and was ſufficient to pay it unleſs redeemed.

He was croſs-examined, and after he had given his whole evidence, he was objected to as incompetent, (from what he had himſelf ſaid, without any evidence whatſoever on the part of the defendant) becauſe the repayment of the money lent was not proved by ſomebody elſe.

In ſtrictneſs the objection came too late; after he had been ſworn in chief, examined, and croſs-examined.

The ſtrictneſs of law in this reſpect is very wiſe, and ought to be more adhered to: for the relaxation may be abuſed, and muſt always occaſion waſte of time.

But I did not take it upon this foot, "of the objec-"tion's coming too late." I conſidered the objection as if it had been regularly made, before he was examined in chief, and as if the whole of his evidence had come out upon the *voire dire*. And in giving our opinion now, we conſider it upon the mere merits of the objection, ſuppoſing it duly and regularly made. *Vide Poſt. Ca.* 10.

There is no caſe relative to the borrower's competence to be a witneſs upon a penal information againſt the uſurer, wherein either the pleadings are ſtated, or the facts of the caſe ſtated, or any argument by counſel or the bench reported.

There

There is no caſe where the queſtion ever came before any court in *Weſtminſter-hall*, except *Smith*'s caſe, *Trin.* 8 *Jac.* 1. *in C. B.* upon a trial at bar. 2 *Ro. Abr.* 685. *Title* "*Trial*," *letter G. pl.* 2. *Co. Litt.* 6. *b.* and many other books.

Two reaſons are there given for univerſally rejecting the teſtimony of the borrower. *Firſt*, Becauſe it is really to be preſumed his own cauſe, and that the nominal plaintiff is ſet up collaterally by him. *Secondly*, Becauſe it would enable him to avoid his own ſecurities, and diſcharge himſelf of the money borrowed.

The firſt reaſon is now totally exploded; for he is not now preſumed to be the plaintiff in the cauſe.

As to the ſecond—the propoſition laid down is too large. For, there may be uſury which cannot affect the debt, or avoid the contract. The clauſe that avoids the contract is, where the contract is more than five *per cent.* But if a contract be for only five *per cent.* and the lender afterwards takes more, he is liable to be proſecuted for uſury, and to pay the penalty, though it does not avoid the contract. And where it would affect the debt it may have been paid. *Vide Long's caſe. Sir T. Raym.* 191.

All the other caſes are looſe notes of ſayings, or opinions at *niſi prius*; general aſſertions, general inferences without particulars, without argument, without conſideration, without any ſtate of pleadings or facts.

The queſtion being now come before the court, it is neceſſary to conſider it with accuracy and preciſion.

The objection to the competence of the witneſs, can only be ſupported by arguing, either "that the events "of this penal proſecution in favour of the plaintiff, "will *avoid* the bond aſſurance or contracts of the wit-"neſs, and *diſcharge* him from the debt;" or, "that "this cauſe turns upon the ſame points and tranſactions "which, if proved in another cauſe, would avoid the "ſame."

The foundation fails in both propoſitions: and the conſequence would not follow in the laſt, if the premiſes were true.

No

No contract or assurance appears here for usury; or so much as to repay the money. And if there was, the recovery of the penalty upon this information would not affect the contract. The judgment in this action could not be given in evidence, in an action for the debt, though the validity of the contract depended upon the same grounds as the information. That might indeed be a prejudice, *influence*, or bias, upon the mind of the witness, and go to his *credit*; but not an actual *interest* to go to his *competence*. *Ante* 15, 16.

This distinction has not been sufficiently attended to at *nisi prius*: the cases are contradictory, and it is impossible to reconcile them.

The great deference to lord chief justice HOLT's opinion, made the case of the *King*, v. *Whiting*, to be followed for some time: nay, lord HARDWICKE implicitly followed it, in the *King*, v. *Nunez*. *Vide Ante* 105.

At that time there were many cases both ways; a string of both sorts, (and amongst the rest *Watt*'s case in *Hardress*, 331, 332. "That in forgery, perjury, or "usury, the party grieved shall not be admitted as a "witness, because he may receive a consequential ad- "vantage from the verdict; and *Paris*'s case in 1 *Ven-* "*tris* 49. where such a witness was admitted:) none of "which cases were considered or looked into."

But since the case of *Whiting* and the case of *Nunez*, there has been great light thrown upon the distinction between *interest* which affects the *competence* of a witness, and *influence* which goes only to his *credit*. There have been the arguments and judgments, the case of the *King*, v. *Bray*, mayor of *Trintagee*, before lord HARDWICKE, shook the authority of *Rex*, v. *Whiting*; which he there in effect contradicts, (though with guarded decency of expression) notwithstanding his having before followed it in the case of *Nunez*.

NOTE. Sir *James Burrow* says, lord *Hardwicke*'s words were, "If that case was strictly examined, I be- "lieve it would appear that the objection on that case "went rather to the *credit*, than to the competency of "the witness."

Then

Then came the case of the *East-India Company*, v. *Goslen*. There was also a case of *Bailey* and *Wilson*, (about the proof of a will) before the delegates: who were equally divided, "whether the objection should "go to the competence or credit of the only witness "who proved the codicil, subsequent to a second will "setting up again the first will;" and therefore no sentence was given. Thereupon a commission of adjuncts issued; a majority of whom (DENISON, J. being one) held "that it went only to the *credit*:" and sentence was given for the first will. Upon a petition for a commission to review it, it was fully argued: and lord HARDWICKE, on the 15th of *January*, 1744, gave a solemn opinion with the majority of the adjuncts, "that the "witness having administered under the first will, as "agent to the executor, or as executor *de son tort*, and "being liable to actions, the objection went only to the "*credit*, not to the competency."

The solemn discussion in these three cases, drew the line between *interest*, which goes to the competence, and influence, which goes to the credit. It established a rule, "that where the matter was *doubtful*, the objection "should go to the *credit*." *Ante* 15, 16.

It established "that the question in a criminal prose-"cution, being the same with a civil cause, in which "the witness was interested, went generally to the cre-"dit; unless the judgment in the prosecution where he "was a witness could be given in evidence in the cause "where he was interested. I say, generally, because all "rules of evidence admit of exceptions."

After these cases, in that of the *King*, v. *Broughton*, in 1745, lord C. J. LEE over-ruled the three cases of *Rex*, v. *Whiting*, *Rex*, v. *Nunez*, and *Rex*, v. *Ellis*: which opinion of his has been followed since and approved. *Ante* 106.

There has been a remarkable case since I left the bar, *Trinity* 32 & 33 *Geo.* 2. *Bartlett*, v. *Pickersgill*. The defendant bought an estate for the plaintiff: there was no writing, nor was any part of the money paid by the plaintiff. The defendant articled in his own name, and refused to convey; and by his answer denied any trust.

Parol

Parol evidence was rejected: and the bill was diſmiſſed. The defendant was afterwards indicted for perjury, tried at *York*, and convicted upon evidence of the plaintiff, confirmed by circumſtances and the defendant's declarations. The plaintiff then petitioned for a ſupplemental bill in nature of a bill of review, ſtating this conviction: but the petition was diſmiſſed, becauſe the conviction was not evidence. 22 *Nov.* 1762.

This reaſoning ſhews too, that if it was neceſſary, the witneſs was competent to be heard, as to the debt being paid: the recovery could not be evidence. What he ſwore could not be evidence in an action for the debt. There is no danger of hearing of perjury, from hearing him. The defendant may produce the ſecurity and falſify him. If (as here) it is the caſe of a pawn, the witneſs would ſwear againſt his own intereſt to ſay untruly, "the debt was paid and the pledge returned." But, either way the debt is paid; for, unleſs the pledge be redeemed, it is a ſatisfaction.

Suppoſe a witneſs produces a bond, or note, or mortgage, cancelled—ſuppoſe he produces a receipt—there can be no danger in hearing him; for the jury are not bound to believe him. That depends on circumſtances, which may contradict or ſupport his teſtimony.

But if it be neceſſary to prove payment, and the party is not to be heard as a witneſs to prove ſuch payment, the ſtatute would be as effectually repealed as if the borrower could never be a witneſs at all: for they never would ſuffer any body elſe to be privy to the payment, delivering up, or cancelling the ſecurities.

But to go further—all objections to the competence of a witneſs, muſt either be *proved*, or drawn from him on the *voire dire*; or take it in the utmoſt latitude, upon his examination. Vide *next chapter*.

Here was no proof of any objection; or of any doubt remaining. The witneſs ſwore, "That he ſhould neither gain nor loſe by the event of the cauſe;" in every ſhape in which the queſtion could be put: and he ſhews it, by giving an account of the debt being paid. He ſwore upon a *voir dire* "that it was paid."

Had the defendant produced a ſecurity, or proved the pledge to be remaining in his cuſtody, it would have been a different conſideration, "whether the witneſs "who was the borrower of the money, could be exa-"mined to contradict this." But when the whole ground of the objection comes from himſelf only, what he ſays muſt be taken together, as he ſays it, and then the debt is paid.

In every light, we are all of opinion, "that under "all the circumſtances of this caſe, *Benjamin Abrahams* "was a *competent witneſs*," and conſequently that the rule ought to be diſcharged. 4 *Burr.* 2255, 2256. *Bull. N. P.* 288, 289.

Rule the Sixth.

A bankrupt, although he offers to releaſe to the aſſignees all intereſts, dividend, profits, ſurplus, and other benefits, which may ariſe from the diſcharge of a debt claimed by a creditor, is not a competent witneſs to prove ſuch diſcharge until after he has received his certificate.

In MASTER's *qui tam*, v. DRAYTON, *Eaſter*, 28 *Geo.* 3. Action on the ſtatute of uſury, for taking more than legal intereſt on 500*l.* from the 10th of April, to the 20th of October, 1786, tried before HEATH, J. To prove the uſurious contract and taking, *Lightfoot*, the borrower of the money was called; upon the *voir dire*, it appeared that he had not repaid the money, and that he was a bankrupt, and had not obtained his certificate; that the defendant was his aſſignee, and had proved this debt under the commiſſion; whereupon the bankrupt (the witneſs) offered a releaſe to the aſſignees of all intereſt, dividend, profit, ſurplus, &c. which might ariſe from the diſcharge of this debt, or from the increaſe of the fund by the deduction of it; and alſo a general releaſe of all claim whatever to allowance and ſurplus. It was then objected by the defendant's counſel; *Firſt*, that a certificate muſt be obtained before the bankrupt could be a witneſs, or the releaſe operate to make him one; and *Secondly*, that the proſpect of obtaining a certificate by increaſing his fund, was an intereſt which rendered him incompetent.

incompetent. It was anſwered, that if a certificate had been obtained, the releaſe would be unneceſſary; and that the proſpect was only an *influence*, which went to his *credit* and not to his *competence*. But the JUDGE being of opinion, that the releaſe was only applicable to a debt due to a bankrupt, which he might releaſe, or at leaſt his ſhare or advantage in, or from it, rejected the witneſs; and the plaintiff was non-ſuit.

Milles moved to ſet aſide the non-ſuit and for a new trial. He contended it was immaterial by what means the ſtock or fund of the bankrupt was increaſed, if he diſcharged himſelf from all benefit ariſing from ſuch increaſe. He cited *Nares* and another, aſſignees, *Salmon*, v. *Saxby*. A bankrupt was called as a witneſs on behalf of the aſſignees, to whom he had given a releaſe, but not ſuch an one as is generally given in theſe caſes, which is a releaſe of all ſuch allowances as he may be intitled to under the commiſſion. DE GREY, C. J. determined, that a general releaſe was ſufficient, as it diſcharged him from receiving any ſum from the aſſignees. *Sitt. at Guildh. Hil.* 19 *Geo.* 3. *C. P.*

So in *Evans*, v. *Gold*, it is ſaid, that the bankrupt cannot be a witneſs to ſwear property in himſelf, or a debt due to himſelf, without a releaſe of his ſhare in the ſurplus and the dividends, for elſe he is plainly intereſted; which indiſputably proves, that ſuch a releaſe will render him a competent witneſs. *Bull. N. P.* 43.

The releaſe therefore in the preſent caſe diſcharged the bankrupt of all intereſt which could affect him from the deſtruction of this debt of 500*l.* ſuppoſing that the action could be conſidered as working ſuch an effect.

But upon the authority of *Abrahams*, v. *Bunn*, this could not work ſuch an effect. This created only an *influence*, which went to his credit, not to his competence: for though the bankrupt was ſtill liable to an arreſt for this debt, yet that was only an influence, and not an intereſt, and a diſtant influence too, becauſe the defendant had proved the debt under the commiſſion, and had acted as aſſignee under it. 4 *Burr.* 2251. *Ante* 108.

The COURT were of opinion, that this objection rendered the witneſs incompetent, and that he could not

be examined before he obtained his certificate, for notwithſtanding the defendant had proved his debt under the commiſſion, which he may do for the very purpoſe of preventing a certificate, that was no objection to his bringing an action at law and arreſting the bankrupt for the whole debt. Rule diſcharged. 2 *Term. Rep.* 497, 498.

So in the KING, *v.* BLACKMAN, *Hil.* 34 *Geo.* 3. *N. P.* An information againſt the defendant, under ſtatute 17 *Geo.* 2. ca. 40. *ſ.* 10. for having naval ſtores in his poſſeſſion, contrary to *ſtatute* 9 & 10 *Will.* 3. *ca.* 41. The firſt witneſs, a police officer, having ſworn that he found in the defendant's poſſeſſion the naval ſtores in queſtion, was aſked by the defendant's counſel on the *voire dire*, if any other perſon had given information of theſe ſtores, and anſwering in the negative, it was objected that the *ſtat.* 17 *Geo.* 2. having given a moiety of the penalty of two hundred pounds, which that ſtatute inflicts on perſons having naval ſtores in their poſſeſſion to the informer, and no previous information having been given to the admiralty, the witneſs muſt be deemed the informer and therefore *intereſted.*

It was anſwered, that the ſame ſtatute alſo left it in the diſcretion of the judge to inflict a corporal puniſhment in lieu of ſuch fine; that therefore before ſentence it could not appear, whether the puniſhment would be pecuniary or corporal, and if the latter, that would rebut the ſuppoſition of intereſt. The witneſs then acknowledged that he *expected* part of the fine and refuſed to *releaſe.*

Lord KENYON declared he conſidered him *incompetent.* That though there was an option in the judge to fine, or to inflict corporal puniſhment, the former mode had generally been adopted; and though the court had in one recent inſtance inflicted corporal puniſhment, that was becauſe the perſon convicted had declared he did not regard a fine: therefore on the footing of intereſt, he conſidered the evidence of the witneſs inadmiſſible. *Eſpin. Reports* 96.

So alſo in the KING, *v.* EDEN, *Hil.* 34 *Geo.* 3. *N. P.* on an indictment for perjury. The aſſignment was, that in

in an action wherein *Earle* was plaintiff, and *Brett* defendant; it became material to decide, whether the wines in queſtion had been ſold on account of *Earle*, or of *Eden* the defendant to the indictment. *Brett*, defendant in the action, was called as a witneſs, and being aſked if he had paid the debt and coſts in the action at the ſuit of *Earle*, anſwered that he *had not*, but that the bail *had been fixed*.

Lord KENYON refuſed to receive his evidence, obſerving, that in caſe *Eden* was convicted, *Brett* would be relieved in a court of equity againſt the judgment, the verdict having been obtained on the ſole evidence of *Eden*; and therefore he had an *intereſt* which rendered him incompetent. *Eſp. Rep.* 97, 98.

Rule the Seventh.

It is however held, that the intereſt to render a witneſs incompetent, muſt be a certain benefit or advantage ariſing to him from the event of the cauſe; or a certain charge or loſs to which he may be liable: for a future or contingent intereſt; or a future or contingent loſs which he may derive or ſuffer from the event of the cauſe, will not render him incompetent.

Rule the Eighth.

And where a bequeſt to a witneſs, or other immediate intereſt creates *incompetency*, yet if the witneſs executes a releaſe, or offers a ſurrender of that intereſt, and it is refuſed, ſuch refuſal ſhall not deprive third perſons of the benefit of his evidence: *a fortiori*, a releaſe executed renders the releaſer competent.

GOODTITLE, *leſſee of* FOWLER, *and another*, v. WELFORD, *Eaſter* 19 *Geo.* 3. Ejectment in which the leſſors of the plaintiff claimed under the will of *Elizabeth Bezley*; before lord MANSFIELD, *Weſtminſter*. One *Hearle*, who was named executor in the will, and was alſo deviſee of a reverſionary intereſt, expectant on an eſtate for life, in ſome copyhold lands, part of the eſtate deviſed, was called on the part of the plaintiff to

prove

prove the ſanity of the teſtatrix, which was impeached by the defendant. To obviate the objection of intereſt, he had ſurrendered his eſtate in the copyhold lands to the uſe of the heir at law, but *he* had refuſed to accept the ſurrender.

The counſel for the defendant inſiſted that *Hearle* was an incompetent witneſs. *Firſt*, becauſe the ſurrender was ineffectual, and did not extinguiſh his intereſt, not having been accepted: *Secondly*, becauſe he had acted in the executorſhip, having paid different legacies, and therefore had rendered himſelf liable to be ſued, if the will ſhould be ſet aſide.

Lord MANSFIELD, C. J. Over-ruled both objections, and the witneſs being examined, the jury were ſatisfied of the ſanity of the teſtatrix, and found a verdict for the plaintiff.

Bearcroft, *Dunning*, and *Bolton*, on motion for a new trial, for the defendant, beſides the two objections to *Hearle*'s evidence made at the trial, contended, that as executor he was intitled to the reſidue of the perſonal eſtate, not diſpoſed of by the will, and was therefore intereſted on that account to ſupport it.

The ſolicitor-general and *Lane*, for the plaintiff,—in anſwer to the objection, that *Hearle* might be liable to be ſued for what he had done in the character of executor, if the will were ſet aſide, relied on the caſe of *Lowe*, v. *Joliffe*, where one *Dovey*, an executor, who had releaſed a legacy given him by the will, and therefore took no beneficial intereſt, was admitted on a trial at bar to prove the teſtator's ſanity, although he was objected to, on the general ground of his being liable to be ſued for his act as executor, if the will ſhould be ſet aſide, and alſo becauſe he had actually ſold a ſet of chambers, which had belonged to the teſtator, and was therefore anſwerable to the purchaſer for the title. *Eaſt.* 2 *Geo.* 3. 1 *Blackſ. Rep.* 365.

For the defendant, in reply it was ſaid, in the caſe of *Lowe*, v. *Joliffe*, the purchaſer of the chambers was in court at the trial, and upon the objection made, offered to releaſe *Dovey*, and that *Dovey* was only admitted as a witneſs in conſequence of that offer.

NOTE.

NOTE. According to the report in *Blackſtone*, the court thought there was no occaſion for a releaſe. 1 *Blackſ. Rep.* 366.

Lord MANSFIELD. A motion has been made for a new trial, not on the merits, but on the incompetency of a witneſs. When the witneſs was produced, the counſel for the plaintiff read his ſurrender of the copy-hold eſtate, left to him by the will, but it was objected, that this ſurrender had not been accepted. The witneſs on being queſtioned ſaid, he had acted as executor, and that the legatees had received their legacies under the will. On this ground alſo it was contended, that he was intereſted, becauſe if the will ſhould be ſet aſide, he would be anſwerable for having anſwered *de ſon tort*. But he was not objected to on the trial, as being entitled to the reſidue of the perſonal eſtate. Now on ſuch a motion as the preſent, no objection to a witneſs ſhould be received which was not made at the trial. If this new objection had been made *then*, it might perhaps have been ſhewn that there was no reſidue, or a releaſe might have been given, &c. As to the other objections—*Firſt*, the bequeſt to the witneſs would certainly have gone to his competency, if he had not parted with his intereſt; but as he has parted with it, as far as depends upon him, third perſons have a right to his teſtimony, and the ſurrenderee ſhall not deprive them of it, by refuſing to accept the ſurrender. *Secondly*, it is contended, that, in an action concerning land, an executor is not a competent witneſs, becauſe he may be ſued for his adminiſtration of the perſonality. But he certainly has no immediate intereſt in the action, and it was determined by lord HARDWICKE, on a petition for a commiſſion of review, and afterwards by the delegates, that it is no objection to an executor's teſtimony, that he may be liable to actions *de ſon tort*.

WILLES *and* ASHURST, J's. concurred.—Rule diſcharged. *Dougl.* 134, 135, 136.

The KING, *v.* WILLIAM NEWLAND, *Old-Bailey*, *February ſeſſions*, 1784, before PERRYN, B. preſent ADAIR, Recorder, *Lond.* Indictment for forging a bank note, ſigned

ſigned "*William Lander*, for the governor and company "of the bank of England."

Lander was a caſhier of the bank of England, properly authoriſed by the directors, to ſubſcribe bank notes with his own name, for the governor and company: and had given ſecurity to them for the faithful performance of this duty.

The queſtion was, whether he was a competent witneſs to prove, that the bank note charged to be forged was not *a genuine* bank note; and that the name *William Lander* ſubſcribed thereto, was not his hand writing.

GARROW, for the defendant—contended that *Lander* was incompetent, from the intereſt which he had in the event of the proſecution; for, upon a ſuppoſition that he had ſigned the note, by virtue of the authority delegated to him for that purpoſe, by the court of directors, and had iſſued it ſo ſigned, without carrying it to the account of the bank, he would be liable to a criminal proſecution for the fraud, and to a civil action on his ſecurity bonds for the damage which the bank might eventually ſuſtain; and therefore, although perhaps he was not liable to the holder for the amount of the note, he was deeply *intereſted* to ſwear, that the name ſubſcribed to it was a forgery, as the only means of avoiding the detection of the fraud. An intereſt, however faint or remote, is ſufficient to deſtroy the competency of the witneſs. A commoner who comes to ſay, that a common is not commonable, but for ſuch a number of cattle, or to ſuch a deſcription of perſons; a corporation who would confine the exerciſe of a franchiſe; a pariſhioner, in a queſtion concerning the removal of a pauper, are all inadmiſſible witneſſes on the ground of intereſt; and yet their intereſt is extremely diſtant and minute. A maſter may maintain the ſuit of his ſervant; but if he acknowledge that he is under an honorary conſideration to pay his coſts, he cannot be examined in the cauſe.

NOTE. A witneſs was rejected on this ground by PARKER, C. B. *per* PERRYN, B. The KING, *v.* WOOLRIDGE, *Q. B. Feb. ſeſſ.* 1784.

Suppoſe a ſervant aſſaulted in defence of his maſter; if on a trial of an action for this injury, the maſter were

were to declare that although he was not bound by law to defray the coſts of an acquittal, yet that in honour and generoſity he ought not to permit his ſervant to ſuffer, his teſtimony would be rejected, from the preſumed bias of his mind on the ground of intereſt: for, to uſe the words of lord MANSFIELD, "courts of juſtice do "not ſit to weigh what degree of temptation the minds "of men are capable of reſiſting, but to take care that "they ſhall not be expoſed to any temptations whatſo-"ever." If this were the caſe of a common forgery, the objection would be unanſwerable, for it is ſettled, that a perſon who has ſubſcribed a note, and is therefore *prima facie* liable to pay it, cannot be examined to impeach the ſecurity, and the intereſt which *Lander* has upon the preſent occaſion cannot be thought leſs conſiderable. 1 *Term. Rep.* 296.

Bearcroft for the crown, it has been the conſtant and unoppoſed practice of courts, to admit the caſhiers of the bank to prove the forgery of their ſignatures to bank notes. It is certainly true, that when a witneſs is called to prove a propoſition in which he is directly intereſted, to ſay "*yes*," rather than "*no*," he ſhall not be admitted as a witneſs to ſay "*yes*." I admit alſo that the queſtion is not on the quantity of intereſt; for if an intereſt amounts only to five ſhillings, it is equally objectionable as if it amounted to twenty thouſand pounds. I admit alſo that if *Lander* came here to prove the forgery of his own note, he would not be a competent witneſs, becauſe his own note he would be, *prima facie*, liable to pay; but *Lander*'s ſignature, as caſhier of the bank, does not bind himſelf, for it profeſſes to be "*for the go-*"*vernor and company of the bank of England*," and the holder of a note ſo ſigned, can call only on the governor and company to pay it. The fact of *Lander*'s not being perſonally liable, is a ſufficient anſwer to this objection, for nothing but an immediate, direct, and perſonal intereſt, is ſufficiently ſtrong to overthrow the competency of a witneſs. The objection indeed cannot be ſpeciouſly ſtated, except on a preſumption of *Lander*'s having abuſed his truſt: but the rule of law is to preſume innocence until guilt be proved; and therefore an intereſt

cannot be inferred from such a presumption, in order to ground an objection to the competency of his evidence.

COURT. This case is perfectly clear: *Lander* does not make himself personally responsible by signing bank notes in his own name, "for the governor and company "of the bank of England," and the law will not permit so forced and violent a *presumption* to be raised, as that a witness is guilty of a crime, in order to lay a foundation to raise an objection to his competency on the ground of interest.

To repel the testimony of a witness, who comes to prove the forgery of his own hand writing, it must appear that he would be liable to be sued, in case the signature was genuine. The interest must be *apparent* on the face of the instrument itself; or arise *immediately* from the *nature* of the *transaction*; or from his own *acknowledgment*: for if a witness *admits* himself to have an interest, whether he hath an interest or not, yet the belief of it hath an equal operation on his mind; and in either of these cases it would be a legal objection to his testimony. *Vide Post* .

In the present case, unless criminality be presumed, interest cannot be inferred, and such a presumption is certainly repugnant to the first principles of law. *MS. Leach's Cr. ca.* 2 *Ed.* 256. 3 *Ed.* 350. *Vide* 1 *Term. Rep.* 296. *Post* . *Dougl.* 134. *Goodtitle, &c.* v. *Welford.* *Ante* 120, 121.

Therefore in CARTER, *v.* PEARCE, *administratix, &c. of* BIGGS. *Easter*, 26 *Geo.* 3. Declaration for work and labour, money paid, &c. Plea the general issue, except as to 2*l.* 5*s.* and as to that, a tender by the defendant, on both of which issues were joined.

HOTHAM, B. Tried the cause at *Salisbury*, when a verdict was found for the defendant, subject to the opinion of the court on a case, which stated that the sum of 2*l.* 5*s.* was tendered to the plaintiff by one *Wood*, who was one of the defendant's securities by bond in the ecclesiastical court, for her duly administering the intestate's effects.

The COURT, after argument by *Rikyll* for the plaintiff, and *Gibbs* for the defendant, said, no doubt could be

be entertained on the competency of the evidence; and that if a creditor of the adminiſtratrix had been offered as a witneſs, which was a ſtronger caſe, there could be no objection to his evidence being received. The bare *poſſibility* of an action being brought againſt a witneſs, is no objection to his *competency*. And,

BULLER, J. added—that this was not like the caſe of *bail*, becauſe they are directly and immediately intereſted; for if a verdict be given againſt the principal, the bail becomes *immediately* anſwerable. In order to ſhew a witneſs intereſted, it is neceſſary to prove, that he muſt derive a *certain* benefit from the determination of the cauſe one way or other. 1 *Term. Rep.* 163. *Vide Groſs*, v. *Tracy*. *Peere Williams*, 288.

Rule the Ninth.

Public policy has eſtabliſhed that no party who has ſigned a paper or deed, ſhall ever be permitted to give teſtimony to invalidate that inſtrument which he hath ſo ſigned; becauſe every man who is a party to an inſtrument, gives a credit to it: but this rule only applies to ſuch inſtruments as are negotiable.

As in WALTON, and others, *aſſignees* of SUTTON, *v.* SHELLY. *Trinity*, 26 *Geo.* 3. This was a motion for a new trial, on an action upon a bond given by the defendant to *Sutton*, to which there was a plea of *non eſt factum*, and another of the ſtatute of uſury. On the trial before BULLER, J. it was proved by one witneſs for the defendant, that the bond was given in conſideration of delivering up two promiſſory notes made by Mr. *Perry*, payable to *Birch*, or order, the one indorſed by *Birch* and *Davenport Sedley*, the other by *Birch*, *Corbyn*, and *Davenport Sedley*, to *Sutton*. *Davenport Sedley* was then called by the defendant to prove, that the conſideration for the notes was uſurious, but his evidence was objected to on two grounds. *Firſt*, that he was called on to invalidate a ſecurity which he had given; and that the indorſer of a note, independent of any queſtion of intereſt, could not be permitted to prove a note void which he himſelf had indorſed. *Secondly*, that he was

intereſted in the queſtion which was meant to be put to him, for if the notes were given for an uſurious conſideration, he would never be liable to pay them, though by overturning the bond they might be ſet up again.

This motion was made upon the ground that *Davenport Sedley* was a competent witneſs, and ought to have been admitted to prove the fact of the uſury.

Lord MANSFIELD, (after counſel were heard on both ſides) ſaid, the old caſes upon the competence of witneſſes have gone upon ſubtle grounds. But of late years, the courts have endeavoured, as far as poſſible, conſiſtent with thoſe authorities, to let the objection go to the credit, rather than the competency of the witneſs: in this caſe it ſeems to me, that the witneſs had no intereſt in the preſent queſtion. If the bond is good, it puts an end to the notes; if bad, the ſame ground that vacates the bond vacates the notes, therefore in point of *intereſt* there is no objection to his competency. But it is a rule of law, founded on public policy, that no party who has ſigned a paper or deed, ſhall ever be permitted to give teſtimony, to invalidate that inſtrument which he hath ſo ſigned. And there is a ſound reaſon for it, becauſe every man who is a party to an inſtrument, gives a credit to it. It is of conſequence to mankind, that no perſon ſhould hang out falſe colours to deceive them, by firſt affixing his ſignature to a paper, and then afterwards giving teſtimony to invalidate that inſtrument which he has ſo ſigned. It is emphatically right in the caſe of notes, for in conſequence of different ſtatutes, two very hard caſes have ariſen. *Firſt*, in reſpect to a gaming note, which though in the poſſeſſion of a *bona fide* purchaſer, without notice, is void. It is ſimilar in the caſe of uſury: a note given for an uſurious conſideration, though in the hands of a fair indorſee, is equally void. And therefore whenever a man ſigns theſe inſtruments, he is always underſtood to ſay, that to his knowledge there is no legal objection whatever to them. The civil law ſays, *nemo alligans ſuam turpitudinem eſt audiendus*. Now apply this general maxim to the preſent caſe, with the diſtinction which has been taken. It has been argued at the bar, that this rule only holds where

where the action is brought upon the notes themſelves, and therefore not relevant to this caſe. But the caſes are exactly the ſame. For the queſtion on the validity of the bond, involves in it the validity of the notes. The obligee of this bond truſted to the notes; he gave them up as a conſideration for the bond; he truſted to the name of the indorſer, and that *he* knew of no objection to the notes; and yet this ſame perſon was afterwards called to ſay, that they were given for an uſurious and illegal conſideration; therefore I am of opinion, that he was an *incompetent* witneſs.

WILLES, J. Conſidered *Sedley* as having no *intereſt*, but that he came to give evidence againſt his intereſt; becauſe by deſtroying the bond he ſets up the notes. The general rule is, that no man ſhall be permitted to invalidate, by his own teſtimony, an inſtrument to which he is a party; and there has been no caſe cited in which this rule has been impeached; though there has been a caſe where a man was ſuffered to explain his own deed, but the explanation was againſt his own intereſt. It is better, in general, that objections of this kind ſhould go to the *credit* than to the *competency* of the witneſs: but the preſent queſtion falls within the general rule, that no man ſhall be permitted to alledge his own turpitude in having given credit to a falſe and illegal ſecurity.

ASHURST concurred.

BULLER. Two grounds of objection have been taken. The firſt ſteers clear of intereſt in the event of the cauſe. There is no foundation for the diſtinction attempted between the preſent caſe and an action on the notes themſelves: for if an action be brought on a note againſt the drawer, an indorſer cannot be called as witneſs for him, though he is not intereſted in that cauſe; and if a verdict be given againſt the drawer, and ſatisfaction obtained from him, the indorſer is diſcharged. In that caſe it is his intereſt to charge the drawer, therefore there is no difference between an action upon the notes againſt the drawer, and the preſent action upon the bond—but the ground of objection has always been, that no man ſhall invalidate his own ſecurity.

As

As to the queſtion of *intereſt*, the beſt rule to go by is to conſider whether the witneſs was to derive any advantage from the event of the cauſe; but many caſes tend ſtrongly to contradict that idea. The material thing to be conſidered is, whether there is any diſtinction between the intereſt which the witneſs may have in the *iſſue of the cauſe* and the *queſtion* put to him. The moſt ſolid ground is to confine the objection to an intereſt in the event of a cauſe: but in doing that we muſt overturn many caſes. As in the caſe of commoners; if the iſſue be on a right of common, which depends on a cuſtom pervading the whole manor, the evidence of a commoner is not admiſſible, becauſe as it depends upon a cuſtom, the record in that action would be evidence in a ſubſequent action, brought by that very witneſs to try the ſame right: therefore there is good reaſon for not receiving his teſtimony in ſuch caſe. But the ſame reaſon does not hold, where common is claimed by preſcription, in right of a particular eſtate, becauſe it does not follow, that if *A.* has a preſcriptive right of common belonging to his eſtate, that *B.* who has another eſtate in the ſame manor, muſt have the ſame right; neither would the judgment for *A.* be evidence for *B.* and yet there are caſes, which lay it down as a general rule, that one commoner is in no caſe a witneſs for another.

Then in the caſe of policies of inſurance, it has been held, that one under-writer cannot be a witneſs for another. *Ridout*, v. *Johnſon*, Eaſt. 11 *Ann.* *Eaſt-India Company*, v. *Goſling*, 16 *Geo.* 2. *Cor.* LEE, C. J. *Bull. N. P.* 283. *Vide Bent*, v. *Baker*. *Poſt.* 128.

In theſe caſes, if the evidence offered tends to invalidate and deſtroy the inſtrument itſelf, that may be a reaſon for rejecting ſuch teſtimony; but where ſuch evidence is offered for any other purpoſe, there does not ſeem to be any good reaſon why it ſhould not be received; for that verdict could not be given in evidence in another action upon the ſame policy, againſt the witneſs or another under-writer. The caſes on this ſubject which have ſtaggered me moſt, are *French*, v. *Backhouſe*, and *French*, v. *Foulſton*. Thoſe were two diſtinct actions

actions of covenant, againſt two part owners of a ſhip, by the huſband of her who had been appointed by a deed, executed by all the joint owners, by which deed they empowered him generally, to advance or lend money, &c. The huſband of the ſhip inſured for all the owners, and brought ſeparate actions againſt two of them. They were each of them charged for the whole ſum paid. It was there agreed, that the direction to inſure, given by one part owner, did not bind the reſt, and in the firſt action, *Backhouſe*, the other part owner, was offered as a witneſs, he not being *intereſted* in the event of the ſuit. But he was rejected as incompetent. 5 *Burr.* 2727. 1 *Term. Rep.* 296 *to* 303.

But in JORDAINE *v.* LASHBROKE, *Trin.* 38 *Geo.* 3. *B. R.* The principle upon which the laſt caſe was decided, was argued at large by counſel, and fully ſpoken to by the court, who denied the principle to have ever been admitted, prior to the determination in *Walton* v. *Shelly*, and it was ſolemnly decided, (ASHURST, J. only diſſenting) that in an action by an indorſee of a bill of exchange againſt the acceptor, the latter might call the payee and indorſer to prove, that the bill was void in its creation, as being drawn in *London* without ſtamp, though dated at *Hamburgh*, and that the caſe of *Walton* v. *Shelly*, was not law. 7 *Term. Rep.* 601. *Rich* v. *Topping*. *Peake's Ca.* 224. *Eſpin.* 177. *S. C.* Vide *Poſt.* 198. *S. C.*

So that unleſs the *modern* rule laid down before lord KENYON, ſhould *hereafter* be reverſed by the ſupreme court of judicature, the *ninth rule* of this chapter decided before lord MANSFIELD is *not* to be conſidered as an authority.

The above caſes, however, though they illuſtrate, do not effect the rules of *competency* and *credit*, in proſecutions at the ſuit of the crown: for a witneſs incompetent on a civil iſſue, may be competent on a criminal proſecution, as in caſe of aſſault, &c. Vide *Approvers and Accomplices. Poſt.* 183. *and Jordain* v. *Laſhbroke. Poſt* 198.

Rule the Tenth.

Where a perſon makes himſelf a party in intereſt, after a plaintiff or defendant has an intereſt in his teſtimony,

mony, he may not by this ſubſequent act deprive the plaintiff or defendant of the benefit of his teſtimony.

BENT *v.* BAKER, and *another*, in error. *Hilary* 29 *Geo.* 3. *B. R.* Aſſumpſit on a policy of inſurance in the common bench. Plea the general iſſue. Lord LOUGHBOROUGH tried the cauſe.—The defendant produced *George Bowden*, an inſurance broker, as a witneſs, to prove circumſtances tending to ſhew, that the underwriters on the ſame policy were not liable to pay the loſs; who being ſworn ſaid, that he was employed as a policy-broker by the plaintiffs, to procure the policy of inſurance, in the declaration mentioned, to be ſubſcribed by the defendant, and the ſeveral other perſons whoſe names are ſubſcribed thereto as aſſurers. And that he as ſuch policy-broker, procured the ſame to be ſubſcribed by the defendant, as an aſſurer for one hundred pounds, in ſuch manner as in the declaration is in that behalf mentioned, and that he, within the ſpace of one hour after the ſaid policy had been ſo ſubſcribed by the defendant, and the other perſons whoſe names are ſubſcribed thereto prior to the witneſs, ſubſcribed the ſame policy for two hundred pounds, and became an aſſurer to the ſaid *Peter Barker* and *John Dawſon*, and that an action had been commenced againſt him at the ſuit of the plaintiffs; and was then depending in his majeſty's court of the bench at Weſtminſter, as ſuch aſſurer for the ſaid two hundred pounds, for and in reſpect of the ſaid loſs alledged in the declaration, and in which action the ſame queſtion was depending as in this action againſt the defendant. And alſo that he, together with the defendant, and ſeveral other under-writers, upon the ſame policy had filed a bill in equity, in the court of exchequer againſt the plaintiffs, for a diſcovery of divers matters reſpecting the policy and aſſurance for the purpoſe of avoiding the ſame, and alſo praying to be relieved againſt the ſame, which bill in equity was then depending in the court of exchequer. And thereupon the counſel for the plaintiffs, on behalf of the plaintiffs, did then and there inſiſt, that he was not a competent witneſs on behalf of the ſaid defendant, upon the iſſue joined between the parties, whereupon the ſaid defendant

dant and his attorney, produced a releaſe duly executed by them to the ſaid *John Bowden*, of all demands for any proportion or contribution of any coſts, either in law or in equity, and that they would, at their own expence, procure the bill in equity to be diſmiſſed as to them; but which offer the ſaid plaintiffs did not accept, alledging, that the ſaid ſuit was ſtill depending, and there were other plaintiffs therein beſides the defendant and *George Bowden*; whereupon the ſaid chief juſtice did then and there refuſe to admit the evidence of the ſaid *George Bowden*, ſo offered as aforeſaid. And the counſel for the defendant then *excepted* to the opinion of the chief juſtice; inſiſting, that the ſaid *George Bowden* was a competent witneſs for the defendant, touching the matters in queſtion.

Lord LOUGHBOROUGH, C. J. C. P. ſigned the bill of exceptions on which the whole of the above proceedings appeared.

Chambre, for the plaintiff in error—argued, that there ſeemed to be three objections to the competency of the witneſs. *Firſt*, that he had *a direct intereſt in the ſuit*, inaſmuch as he expected to contribute to the coſts of it. *Secondly*, that he had *an intereſt in the queſtion* put to him. *Thirdly*, that he had a *collateral intereſt*, ariſing from his being a party to a ſuit in equity, which might be affected by the deciſion of this ſuit. In anſwer to the firſt, *prima facie*, every witneſs muſt be taken to be competent until the contrary appears: the plaintiff therefore ſhould have ſhewn ſome fact in this caſe to diſqualify the witneſs. It ſhould have been ſtated, that the witneſs was under ſome engagement to contribute to the coſts; whereas it only appears that he *expected* ſo to do, which may mean a voluntary act. But even if there were any objection on this head it was entirely awed by the *releaſe*, which was executed by both the defendant in the action, and his attorney. As to the *ſecond* objection, the general rule appears from the *King*, v. *Bray*, and *Abrahams*, v. *Bunn*, to be, that a witneſs is competent, unleſs he has an intereſt *in the event of the ſuit*; though there are indeed exceptions to that rule, one of which is ſuppoſed to be, that of an under-writer on the ſame

policy in any action brought on that policy. But it is not neceſſary to contend here, that this is not an exception to the rule, becauſe it does not apply to this witneſs. He was not originally an under-writer on the policy for himſelf, but acted as agent for the perſons for whom the policy was effected. And when he had diſcharged his duty as agent, he was a competent witneſs for each party: then he could not by any act of his own, diveſt the parties of that right which they had in his teſtimony; ſtill leſs could he do this by any act in concurrence with the aſſured themſelves. In ſome caſes, even though a perſon has an immediate intereſt in the ſuit, he muſt be admitted a witneſs from *neceſſity*, as where an agent of one perſon pays money to another, the agent is actually intereſted in proving the payment, as he thereby diſcharges himſelf to his principal. And the admiſſion of this witneſs will not be productive of ſuch miſchievous conſequences as the rejection of his teſtimony, becauſe in contracts of this ſort much depends on the repreſentation of the broker. The *third* objection cannot be carried farther than the ſecond, becauſe it ariſes from the intereſt which he had acquired to himſelf, by improperly ſubſcribing the policy, after he had acted as an agent between the parties; beſides, it has been repeatedly determined, that it muſt be a *direct* and not a *conſequential* intereſt only, to render a witneſs incompetent. *Carter*, v. *Pearce*, and *Bailey*, v. *Wilſon*, cited in *Abrahams*, v. *Bunn*. *Ante*

And here it is to be obſerved, that this created no *intereſt* in the witneſs, nor even any *bias* on his mind; for this record could not affect the ſuit in equity. Here too the bill in equity could not have been affected by this verdict as againſt this witneſs, if it were obtained on his teſtimony alone: for no man can recover on his own teſtimony: the courts of equity would oblige him to make out his caſe on other evidence. At all events, the ſame anſwer may be given to this as to the firſt objection, that it was done away by the offer at the trial, to diſmiſs the bill as to him, and to pay all the coſts. In *Goodtitle*, v. *Wilford*, where the deviſee in remainder of a copyhold eſtate, was called to prove the ſanity of a teſtatrix,

teſtatrix, on his offering to releaſe all his intereſt to the heir at law, he was held to be a competent witneſs, although the heir at law refuſed to accept the releaſe. *Vide the caſes cited and alluded to in this argument. Ante*

Wood, for the defendants in error—whatever inconvenience may ariſe to the public, from brokers underwriting policies of inſurance in their own names, it muſt be remedied by the legiſlature; but the eſtabliſhed rules of evidence cannot be broken. Though *Bowden* might poſſibly have been a competent witneſs to ſome purpoſes, among others to prove the ſubſcription of any under-writer, becauſe he could ſpeak to the fact merely in his character of agent; yet he was incompetent for the purpoſe for which he was called, namely, to prove ſomething in which he was *equally intereſted* with all the other under-writers. That *intereſt* was a fatal objection to his teſtimony: and the court will be leſs inclined to over-rule this objection, becauſe it was in the witneſſes power to remove his incompetency by paying his ſubſcription. It was expreſsly determined in *Ridout*, v. *Johnſon*, *Dougl.* 134. that one under-writer cannot be a witneſs in an action between other parties on the ſame policy. That rule has conſtantly prevailed ſince; and it ſhews that if the witneſs be intereſted in the *queſtion* put to him, it is the ſame objection as if he were intereſted in the *event of the ſuit*. There is alſo another rule which would defeat the evidence of this witneſs, that a party ſhall not be permitted to give teſtimony to avoid an inſtrument which he himſelf has executed. This was ruled in *Walton* and *Shelly*, 3 *Term. Rep.* 296, where the witneſs was called to ſpeak againſt his own intereſt: and there the rule reſpecting under-writers was recognized. As to the intereſt which it is contended the other under-writers had acquired in *Bowden*'s teſtimony; that argument is intitled to little conſideration, for they muſt all be taken to have ſubſcribed at the ſame time, and the riſk and the intereſt of the parties are the ſame. And if the plaintiff's argument were to hold, it would become neceſſary to conſider at what time the witneſs became intereſted: but it has always been held to be a ſufficient objection to a witneſs, that he is *intereſted* at

the time of the trial. Otherwiſe the ſame argument would alſo apply to the caſe of commoners; and if one purchaſed his right of common a ſhort time previous to the trial, he might be examined to any matter that aroſe before he became intereſted, ſince it might equally be ſaid, that the other commoners had acquired a right in his teſtimony, of which he could not deprive them, by becoming a commoner himſelf. As to the caſe of *Barlow*, v. *Vowell*, *Skin.* 586. *Bull. N. P.* 290. where HOLT, C. J. ruled, that a perſon who made himſelf a party in intereſt, after a plaintiff or defendant had an intereſt in his teſtimony, could not deprive them of a benefit in his teſtimony, as if he be a witneſs of a wager, and afterwards bet on the ſame matter: that only ſhews, that after the wager he is a competent witneſs to prove the contract itſelf, but nothing more. For in *Reſcous*, v. *Williams*, 3 *Lev.* 152. which was an action for money had and received, againſt the defendant, in whoſe hands a wager had been depoſited by the defendant and another, it was held, that a perſon who laid the ſame wager was not a competent witneſs for the perſon on whoſe ſide he betted. Now a policy of aſſurance may be conſidered as analogous to a wager; and each under-writer has the ſame ſort of intereſt which the better has in the caſe of a wager.

Chambre, in reply—the caſe of *Walton*, v. *Shelly*, did not eſtabliſh as a general poſition, that in no caſe can a witneſs be called to invalidate an inſtrument which he himſelf has ſigned; for in a caſe which happened ſoon afterwards at the ſittings, BULLER, J. held, that the rule only extended to ſuch *inſtruments as are negotiable*; ſo that it does not apply to a caſe like the preſent. But even if it were to be conſidered as a general rule, ſtill the particular circumſtances of this caſe furniſh an exception to it. The caſe in *Levinz* is contrary to univerſal practice; and it is anſwered by the rule laid down in *Skinner*, which is deciſive on this head. It makes no difference here, whether the objection to this witneſs ariſes from his being intereſted in the *queſtion*, or in the event of the cauſe, ſince the *releaſe* diſcharged him from every intereſt in both. Beſides, he was rejected generally; now,

if

if he were competent to anſwer *any* queſtion, there muſt be judgment for the plaintiff in error.

Lord KENYON, C. J. After ſtating the caſe, ſaid, the queſtion is, whether under all the circumſtances, *Bowden* was or was not a competent witneſs? Lord MANSFIELD, in *Walker*, v. *Shelly*, ſaid, "that the old "caſes upon the competency of witneſſes, have gone "upon very ſubtle grounds. But of late years the "courts have endeavoured, as far as poſſible, conſiſtent "with thoſe authorities, to let the objection go to the "*credit*, rather than to the *competency* of the witneſs." 1 *Term. Rep.* 300. *Ante*

And if the opinion of ſo great a judge ſtood in need of any ſupport, it would have it from the ſentiments of lord HARDWICKE, in the caſe of the *King*, v. *Bray*, who ſaid that whenever a queſtion of this ſort aroſe, on which a doubt might be raiſed, he was always inclined to reſtrain it to the credit, rather than to the competency of the witneſs, making ſuch obſervations to the jury as the nature of the caſe ſhould require. *Rep. Temp. Lord. Hard.* 360.

Fortified with two ſuch authorities as theſe, there can be no doubt that, wherever there are not any poſitive rules of law againſt it, it is better to receive the evidence of the witneſs, making nevertheleſs ſuch obſervations on the credit of the party as his ſituation requires. Then it is to be conſidered, what is the queſtion put to a witneſs on his *voir dire*. It is, is he really intereſted in the cauſe? Sometimes, indeed, the counſel enter into the detail and aſk how he is intereſted. But the general queſtion involves in it all the others, and amounts to this, whether the record in that cauſe will affect his intereſt? upon that ground has the caſe of commoners proceeded. It is very probable that in *preſcriptive* right of common, other perſons living in the ſame manor may have correſpondent rights: yet, unleſs the queſtion turns on a *cuſtom*, equally beneficial to them *all*, the teſtimony of *one* muſt be admitted to prove his neighbours *right*. But if the right be claimed under a *cuſtom*, that all the inhabitants of a pariſh ſhall have a right of common, all thoſe who fall under that deſcription

tion are intereſted, becauſe the verdict in that cauſe may afterwards be uſed in evidence to eſtabliſh the ſame right in the reſt.

Now in this caſe the objections made to this witneſs, may be reſolvable into the three mentioned by the plaintiff's counſel. *Firſt*, that he had a direct intereſt in the ſuit. It is true that he had an intereſt when he came into court to give his evidence, by virtue of that engagement which he has made, but the bill of exceptions alſo ſtates, that the releaſe was executed to him, which entirely removed that objection. The next objection is, that the witneſs was party to a ſuit in equity, and that eventually he was liable to the coſts: but no perſons but the plaintiffs below could call on him for thoſe coſts; now the defendants below and the witneſs, offered that the bill ſhould be diſmiſſed as to them at their own coſts, which however was refuſed: But after ſuch a refuſal, neither in juſtice nor common ſenſe can we ſuffer thoſe parties to make the objection. Then the remaining objection is, that he was an under-writer on the ſame policy. There have been various opinions upon this ſubject, and it is impoſſible to reconcile all the caſes. Then we have only to conſider what are the principles and good ſenſe to be extracted from them all. The principle is this; if the proceedings in the cauſe cannot be uſed for him, he is a competent witneſs although he may entertain wiſhes upon the ſubject, for that only goes to his credit, and not to his competency; as where he ſtands in the ſame ſituation with the party for whom he is called to give evidence there is no doubt but that may influence his teſtimony; or where a father is giving evidence for a ſon: but this does not render him incompetent, and ſuch circumſtances are always open to obſervation. So here the witneſs might have had his wiſhes; his ſituation might have created an influence on his mind; but the queſtion ſtill is, whether he was a competent witneſs? On the grounds ſtated he was. But there is another reaſon for admitting the evidence of this witneſs, on the authority of the caſe in *Skinner*, where it was ruled by HOLT, C. J. that where a perſon made himſelf a party in intereſt, after a plaintiff or defendant has

has an intereſt in his teſtimony, he may not by this deprive the plaintiff or defendant of the benefit of his teſtimony. Then what was the ſituation of theſe parties? We muſt recollect that the broker who effects the policy is the witneſs whoſe teſtimony muſt be reſorted to, by both parties, in caſe of any diſpute. He afterwards ſigned the policy himſelf, which he could not have done without the concurrence of the aſſured themſelves, who had before entered into the contract of the defendant below, through the medium of this broker, and therefore he was to have been deprived of the benefit of his witneſs, by the very act of the plaintiff's themſelves, who objected to his teſtimony at the trial. Then it has been ſaid, that a perſon cannot be permitted to give evidence to invalidate an inſtrument which he himſelf has executed, but I cannot aſſent to that general propoſition, for I remember a caſe of a trial at the bar of this court, where all the ſubſcribing witneſſes to the will were permitted to give evidence of the inſanity of the teſtator at the time of making it. Now in that caſe, they came to deſtroy the inſtrument which they had atteſted, and though their teſtimony was ultimately diſcredited, yet no doubt was entertained reſpecting their competency. *Low*, v. *Joliffe*. 1 *Blackſ. Rep.* 365.

I therefore entirely agree with the diſtinction taken by my brother BULLER, that where a perſon has ſigned a negotiable inſtrument, he ſhall not be permitted to invalidate it by his teſtimony. But that is not the caſe here. However, theſe are only the ſmall points in the cauſe; and I again recur to that which is the principal ground of my opinion, namely, that the witneſs was not intereſted in the cauſe then depending; neither could the verdict by any poſſibility be produced by him in any ſubſequent ſuit.

ASHURST, J. concurred, confining his opinion to the particular circumſtances of the caſe, and not deciding on general rules.

BULLER, J. This caſe involves in it the queſtion, what objections go to the *credit*, and what to the *competency* of the witneſs. In *Ridout*, v. *Johnſon*, it was held, that one under-writer cannot be a witneſs for another, and

and though it might have been determined on its own circumſtances, judges at *niſi prius* guided by it, have frequently rejected under-writers as witneſſes. Two objections argued at the bar are entitled to much conſideration. *Firſt*, that the witneſs was intereſted, becauſe he was to contribute to the coſts: the releaſe is a clear and deciſive anſwer to that. *Secondly*, that he was liable to pay the coſts in the ſuit in equity; and the anſwer to that is, that he did every thing which he could do to diſcharge himſelf from that objection, by offering to diſmiſs his bill at his own coſts. *Goodtitle*, v. *Welford*, ſhews that if a perſon who is tendered as a witneſs, does every thing in his power to get rid of any objection to his teſtimony, it ſhall not be competent to the other party by an obſtinate refuſal to prevent his being examined. *Dougl.* 134. *Ante.*

Then the remaining and principal queſtion is, whether this witneſs, having ſubſcribed this policy as an under-writer, has thereby rendered himſelf altogether incompetent; becauſe if he were competent to anſwer *any* queſtions, he ought not to have been rejected *generally*. Then we muſt ſee whether on this record, the fact to which he was required to ſpeak, might be ſuch as he was competent to anſwer. On the principle of *neceſſity* alone, this witneſs ought to have been received. If the queſtion intended to be put to him were, as to any repreſentation made by him to the under-writers, at the time of ſubſcribing, he muſt be admitted a witneſs from *neceſſity*; for he was the only perſon, who from the nature of the thing, could ſpeak to that tranſaction, and as ſuch the under-writers had a right to call on him for his teſtimony. It is admitted, that had he been called on as an agent, he might have been examined; now *non conſtat*, but that was the caſe here, and he was rejected generally, the judgment muſt be reverſed. On the general queſtion, whether one under-writer can be examined for another, he thought there was no objection to his competency; and thought with lord HARDWICKE, in the *King*, v. *Bray*, that it was better to lean againſt objections to the competency, and to let them go to the credit of the witneſs: and the true line was this, "*is*

"*the*

"*the witneſs to gain or loſe by the event of the cauſe.*" Now this witneſs could not gain or loſe by the event of this cauſe, becauſe the verdict could not be evidence either for or againſt him, in any other ſuit. This has been likened to caſes where witneſſes have been rejected, on the ground that they ſhall not be permitted to invalidate inſtruments which they themſelves have ſigned: but the ground of that objection is, that it is holding out falſe credit to the world, and muſt be confined to negotiable inſtruments. If a perſon were permitted to ſet aſide ſuch an inſtrument, it would enable him to commit a fraud. This witneſs ſhould have been received.

GROSE, J. alſo aſſented, giving as his opinion, that unleſs a witneſs be intereſted in the event of the ſuit, he ought to be received. JUDGMENT *reverſed*: and a *Venire de novo* awarded. 3 *Term. Rep.* 27 *to* 37.

In ROTHEROE and others, *v.* ELTON, *N. P.* after *Trinity Term*, 31 *Geo.* 3. the laſt caſe was fully recognized as law. *Aſſumpſit* on a policy of inſurance on the plaintiff's goods, on board the ſhip *Jeſſe*, of Glaſgow.

The plaintiff called the owner of the ſhip to prove that ſhe was ſtaunch.

Erſkine objected, that the witneſs was intereſted in the event of the cauſe: he comes to exonerate himſelf from the action which the plaintiffs will have againſt him, if they fail in this action; for the law would imply a warranty on his part, that the ſhip was ſtaunch.

Gibbs for the plaintiff, anſwered, that it was determined in *Bent*, v. *Baker*, that a witneſs was competent in all caſes, except where the verdict to be given in the cauſe would be evidence for or againſt him, and that the verdict in the preſent cauſe could not be evidence in an action, by or againſt the owner.

Lord KENYON, C. J. The caſe of *Bent*, v. *Baker*, was determined on ſound principles; but it was there held, that the witneſs was *incompetent*, not only in thoſe caſes where the verdict in the cauſe would be evidence for or againſt him in another ſuit, but alſo where he was directly intereſted in the event of the ſuit. This witneſs is directly intereſted in the manner mentioned by Mr. *Erſkine*.

The plaintiff then releaſed the witneſs, and recovered a verdict. *Peak. N. P.* 85.

And in Fox, *v.* Lushington. *Hil.* 35 *Geo.* The ſame judge, a ſimilar objection was made to the depoſition of *Barry*, the maſter and ſole owner; and *no releaſe* being offered, his depoſition was not read. *Ibid.*

In Smith, *qui tam*, *v.* Prager. *Mich.* 37 *Geo.* 3. *B. R.* The antecedent rules were recognized. Action for uſury, before Kenyon, C. J. *Bromer*, the borrower of the money, was called as a witneſs. It appeared, that he had paid ſeveral of the ſums borrowed by him from the defendant; but was ſtill indebted to him in 4000*l.* on a running account, for the ſeveral loans. *Bromer* had, before the trial, become bankrupt, and had not obtained his certificate: and it was objected, that he was not a competent witneſs, on the ground of intereſt; but the objection was over-ruled, and the plaintiff obtained a verdict. On motion for a new trial—

Law, *Dallas*, and *Giles*, were to have ſhewn cauſe—but, by deſire of the court,

Erſkine, *Garrow*, and *Gibbs*, contra, in ſupport of their rule, contended, that the bankrupt was an intereſted witneſs, becauſe he is called upon to impeach the legality of certain money tranſactions, which are items of the general balance that he owed to the defendant; for which if he did not obtain his certificate, the defendant may ſue him directly; and if he does obtain it, he is equally intereſted in diminiſhing the amount of the debt to be proved under the commiſſion; being entitled to the ſurplus of his eſtate, if any, or to an allowance in proportion to the dividend that his eſtate will produce. Even admitting, according to the authority of *Abrahams*, v. *Bunn*, (*Ante* .) that *Bromer* would have been a competent witneſs, after other proofs had been given that his drafts were paid, yet here he was called upon to prove that fact himſelf, and the repayments ſtated to have been made, were merely payments upon the general account between the witneſs and the defendant, and not diſtinct tranſactions: they admitted, that in *Bent*, v. *Baker*, (*Ante* .) the court ſeemed to have conſidered that the objection only went to the credit of the witneſs,

witneſs, unleſs the verdict in the particular cauſe would be evidence for or againſt him in another ſuit; but they alſo conſidered, that an intereſt in the event of the cauſe went to the competency of the witneſs. And here the verdict would be ſuch an impeachment of the tranſactions, that the lord chancellor would not permit the items in the account to be proved under the commiſſion, which would reduce the defendant's balance. In *Bearda*, v. *Aſhton*, in 1788, lord KENYON refuſed to let the payee of a note who had indorſed it, to prove it uſurious until proof had been given by ſome other perſon that the note had been paid. And they cited alſo *Routhero*, v. *Elton*, *Trin.* 31 *Geo. N. P.* *Ante* .

Lord KENYON, C. J. adhered to the rule laid down in *Bent*, v. *Baker*, that no objection could be made to the competency of witneſs upon the ground of intereſt, unleſs he were directly intereſted in the event of the ſuit, or could avail himſelf of the verdict in the cauſe, ſo as to give it in evidence on any future occaſion in ſupport of his own intereſt. He then ſtated *Abrahams*, v. *Bunn*, to ſhew that by its authority the deciſion in *Bent* and *Baker* ſtood fully confirmed; and concluded by ſaying, that upon the authority of all the caſes he was clearly of opinion, that *Bromer* was a competent witneſs in this caſe: and that the objection to the ſituation in which he ſtood went only to his credit, of which the jury were alone to judge. The other judges aſſenting, the rule was diſcharged. 7 *Term. Rep.* 60 *to* 63.

Rule the Eleventh.

A remote or trifling intereſt ſhall not deſtroy the competency of a witneſs—

And therefore it is no good exception againſt the admiſſibility of a witneſs that he had a maintenance from the king; for any one may maintain his own witneſs. This was determined in,

Richard Langhorn's caſe, 31 *Car.* 2. *Treaſon.* NORTH, C. J. ſaid to the priſoner, as to the witneſſes receiving maintenance and ſuſtenance from the king, that is but reaſonable and no objection. An *approver*,

while he is in the ſervice, hath a penny a day, which in antient times was a great matter, for livelihood and ſuſtenance. 2 *St. Tr.* 891.

So it is no good exception to the *competency* of a witneſs that he hath received a *reward* for having made a diſcovery of the crime to be proved againſt the priſoner.

Or that he hath the promiſe of a pardon or other reward, on *condition* of giving his evidence, unleſs ſuch reward be promiſed by way of contract for giving ſuch and ſuch particular evidence, or full evidence, or any way in the leaſt to bias him to go beyond the truth, which not being eaſily avoided in promiſes or threats of this kind, it is certain, that too great caution cannot be uſed in making them. 2 *Hawk. P. C. ca.* 46. *Rookwood's ca.* 4 *St. Tr.* 684. *Vide p*

HALE however is of opinion, that if an accomplice be promiſed pardon, on condition to give evidence againſt the reſt, that renders him incompetent; becauſe he is bribed by ſaving his life to be a witneſs. On which KELYNG obſerves, that HALE takes a difference where the promiſe of pardon is to the accomplice for diſcloſing the treaſon, and where it is for giving evidence. 1 *Hale P. C.* 304. 2 *Hale P. C.* 2 *Hal. P. C.* 280. *Kely.* 18. But this opinion of HALE is over-ruled. *Vide p*

Rule the Twelfth.

If a witneſs *thinks* himſelf intereſted, although in point of fact he is *not*; he ſhould not be examined as a witneſs.

As in FOTHERINGHAM, *v.* GREENWOOD, *Mich.* 5 *Geo.* 3. A. having money of the plaintiff in his hands, loſes it at play; the plaintiff brings an action after the three months, upon ſtatute of gaming, 9 *Ann, ca.* 14. and produces A. as a witneſs. Upon a *voir dire* he confeſſed, that if the plaintiff recovered he was not anſwerable, but that if he failed then the money was to be deducted out of his fortune, in the plaintiff's hands.

PRATT, C. J. Though the recovery againſt the defendant will not ſink the demand for the money embezzled by A. yet his *apprehenſion* that the plaintiff will not trouble

trouble him for it, is a bias upon him: for if a witneſs *thinks* himſelf *intereſted* in the queſtion, though in ſtrictneſs of law he is not, yet he ought not to be ſworn.

Darnell, ſerjeant, mentioned a caſe wherein Mr. *Chapman*, of Bucks, having owned himſelf to be under an honorary, though not under a binding engagement to pay the coſts of the ſuit. PARKER, C. J. on ſolemn debate refuſed his teſtimony. Earl MANSFIELD has laid down the rule for legal deciſion on the point, that "Courts of juſtice do not ſit to weigh what degree of "temptation the minds of men are capable of reſiſting, "but to take care they ſhall not be expoſed to any temp-"tation whatſoever." 1 *Term. Rep.* 296. *Ante*

In the KING'S BENCH, at the ſitting, *Mich.* 15 *Geo.* 3. On a trial reſpecting a patent. The patentee produced his journeyman, who ſtated to the court, that he had entered into articles to work a number of years for the patentee, and to receive a ſum of money upon the patent; an objection was made to his teſtimony, and a releaſe of the articles being executed by the witneſs in court, it was contended that the objection was removed: but a queſtion was put to him, whether although he had diſcharged his maſter from all the obligations he was under to him, he did not expect when he was out of court to be reſtored to the ſituation he was in before? And, he anſwered—"I believe my maſter is an honeſt "man, and that he could not do the work without me; "and therefore I am well convinced I ſhall be put into "the ſituation from which I have releaſed myſelf."

Lord MANSFIELD, C. J. Upon the idea that the witneſſes imagination led him to ſuppoſe that he ſhould certainly be reſtored to his former ſituation, rejected his teſtimony, and would not ſuffer him to endanger his veracity by being examined on the trial, repeating what he had once before ſaid in delivering a ſolemn judgment from the bench, that—Vide, the laſt cited caſe. *Ante*. . . Cited by COWPER in Mr. *Rudd*'s caſe. *Leach Cr. Ca.* 2 *Edit.* 110. 3 *Edit.* 154.

So in criminal caſes, where a man is indicted for *forgery*, the party whoſe hand is ſaid to be forged, ſhall not be admitted to prove the fact charged of forgery; for

for his hand apparently againſt him, is evidence (until the contrary be proved) of an obligation: and therefore he ſhall not be permitted in the indictment to make proof (while he hath intereſt in the queſtion, the ſuppoſed obligation ſtanding in apparent force againſt him) that it was not his hand. *Gilb. Evid. by Loft*, 222, 223. *Bull. N. P.* 288.

And therefore in the KING, *v.* Dr. DODD, *Old-Bailey, Febr. ſeſſ.* 1777. The earl of CHESTERFIELD, whoſe name appeared to the bond, for the forging of which Dr. *Dodd* was convicted, being produced as a witneſs on the trial, to prove that the name *Cheſterfield* was not his ſignature; on producing a *releaſe* from *Henry Fletcher*, the ſuppoſed obligee of the bond was admitted to give evidence. *Leach Cr. Ca.* 2 *Edit.* 144. 3 *Edit.* 184.

So alſo on an indictment for forging a *receipt* for the payment of money, the perſon whoſe name appears ſigned to the receipt is *not* an admiſſible witneſs to prove the forgery.

As in *Ruſſel*'s caſe, *Old-Bailey*, *February ſeſſions*, 1737. The priſoner was indicted for forging an acquittance and receipt, with an intent to defraud *R. Gately*.

The priſoner's counſel inſiſted, that neither *Gately*'s teſtimony, nor any affidavit made in his name, could be admitted in evidence, on the ground of his being *intereſted:* and cited the *King*, v. *Whiting*. *Salk.* 283. *Vide Ante*

For the crown it was contended, that *Gately*'s evidence was admiſſible, for it went to eſtabliſh the defendant's guilt; and the conſequence of his conviction would be, an immediate forfeiture to the crown of all the property he poſſeſſed: therefore *Gately*'s evidence would tend to deprive himſelf of the poſſibility of ever receiving ſatisfaction for the ſum due to him on this account. The objection of *incompetency* ariſes from the *ſort of intereſt* which the witneſs may have in the nature of the queſtion, or the event of the trial, and if any *advantage* may accrue to him from giving his teſtimony, the law in conſideration of the frailty of the human mind, renders his evidence inadmiſſible. But when the effects of a teſtimony tend to *deprive* the witneſs of a ſubſtantial

tial benefit, the law allows his evidence upon the conception, that he will not untruly charge himſelf, or ſay any thing wrongfully to his own diſadvantage. The court however rejected the evidence offered. *Leach Cr. Ca.* 2 *Edit.* 8, 9. 3 *Edit.* 10.

So alſo on an indictment for forging a *letter of attorney*, whereby the priſoner transferred ſtock, the proprietor of the ſtock is not a competent witneſs to prove the forgery.

As in the KING, *v.* RHODES, *Old-Bailey ſeſſ.* 13 *Geo.* 1. Indictment for forging a letter of attorney, whereby the ſtock of *Heyſham* was transferred; FORTESCUE, J. refuſed to admit *Heyſham* as a witneſs. 2 *Stra.* 728.

But the proprietor of ſtock is a competent witneſs to prove the amount of the ſtock, and the intereſt due thereon, at the time of committing the forgery.

As in the KING, *v.* FRANCIS PARR, *Old-Bailey ſeſſ. Jan.* 1787; the defendant was indicted on *ſtat.* 31 *Geo.* 2. *ca.* 22. *ſ.* 77. for perſonating *Iſaac Hart*, of *Windſor*, the proprietor of 3900*l.* capital ſtock, and thereby endeavouring to receive 58*l.* 10*s.* as for half a year's annuity; and on the trial *Iſaac Hart*, the proprietor of the ſtock, was admitted a witneſs, and examined to prove the amount of the ſtock which he had at the bank, and that the ſum of 58*l.* 10*s.* was due to him for half a year's intereſt due thereon. *Leach Cr. Ca.* 341, 345. *MS.* VIDE *the antecedent chapter throughout.*

So in *Waller*, v. *Shelly*. The *indorſer of a promiſſory note* comes within the rule therein laid down, viz. that the indorſer of a note, independent of any queſtion of intereſt, could not be permitted to prove a note void which himſelf had indorſed. 1 *Term. Rep.* 296. *Ante* .

Though it is held as a general rule, that a perſon whoſe hand is forged to a deed or other inſtrument, cannot be admitted to prove the forgery. Yet under many circumſtances he may be admitted to prove ſuch forgery, as where he is not directly *intereſted* in the queſtion.

As in WELLS's caſe at Oxford, the defendant was indicted for forging a receipt from a mercer in that city; and the mercer having before recovered the money in an action againſt *Wells*, was admitted to prove the forgery, by WILLES, J. *Buller, N. P.* 289.

So

So in an indictment for *perjury* on the ſtatute, the perſon injured cannot be a witneſs, becauſe the ſtatute gives him ten pounds, but in an indictment at common law the party injured may be a witneſs. *Stat.* 5 *Eliz. ca.* 9. *Iriſh* 28 *Eliz. ca.* 1. 3 *Geo.* 2. *ca.* 4. 2 *Hawk. P. C. ca.* 46. *Bull. N. P.* 289.

Rule the Thirteenth.

In criminal caſes witneſſes, though apparently intereſted, are admitted from neceſſity. *Ante* .

As in the KING, *v.* MACKARTNEY, and others, *Mich.* 2 *Ann. B. R.* Indictment for a cheat done to J. S. by impoſing upon him a quantity of beer mixed with vinegar, and grounds of coffee for port-wine, and getting in exchange hats to the amount of 118*l.* one of the defendants pretending to be a broker, and the other a *Portugueze* merchant, for the better carrying on the cheat. HOLT, C. J. allowed J. S. to be a witneſs to prove the fact upon the trial; obſerving, that in ſuch private tranſactions no body elſe can be a witneſs of the circumſtances of the fact, but he that ſuffers. 1 *Salk.* 286. *Holt* 300. *S. C.* 6 *Mod.* 301. *S. C.* 2 *Lord Raym.* 1179. *S. C.* 1 *Siderf.* 431. 2 *Keb.* 572. 1 *Ventr.* 49.

So in the KING, *v.* MOISE, *Trinity*, 10 *Geo.* 1. *N. P.* the indictment againſt the defendant was for tearing a note, whereby he promiſed to pay A. B. a certain ſum of money. A. B. was produced as a witneſs. It was objected that he was incompetent, as by giving evidence he would ſet up his own demand: becauſe if the defendant was convicted, the court would oblige him to give the witneſs a new note. But the judges FORTESCUE and RAYMOND admitted her evidence. 1 *Strange* 595.

So in the QUEEN, *v.* SEWELL, *Mich.* 1 *Ann. B. R.* Indictment for uſury. HOLT, C. J. ſaid. Where a man is intereſted in the conſequence of that which he ſwears for, if it be ſo that the doing the act which he is now evidence to invalidate or ſet aſide, was a means to obtain his liberty from impriſonment, or an exemption from corporal puniſhment, he ſhall be a witneſs; as in the caſe of durey, though it be to ſet aſide his own bond.

He

He ſhall be a witneſs alſo where the nature of the thing allows him no other evidence: as if a woman give a note or bond to a man to procure her the love of J. S. by ſome ſpell or charm, in an indictment for the cheat, though it tend to avoid the note yet ſhe may be a witneſs. 7 *Mod.* 119, 120.

And on the ſame principle "neceſſity" the wife, where the injury is committed on herſelf, is a competent witneſs againſt her huſband. Vide *Lord Audley's ca. &c. Poſt* .

So laying a wager doth not incapacitate a man from being a witneſs.

So in the KING, *v.* FOR, *Mich.* 12 *Geo.* 1. Aſſault. It was proved that the proſecutor had laid a wager that he would convict the defendant. The Chief Juſtice held him a good witneſs for the king, though the objection went to his credit. 1 *Stra.* 65. 3 *Lev.* 152.

CHAPTER X.

Of examining a witneſs on the voire dire, in order to diſcover his competency.

VOIRE DIRE, veritatem dicere, is when it is prayed upon a trial at law that a witneſs be ſworn, that he "ſhall true anſwer make to all ſuch queſtions as ſhall be "demanded of him, and ſhall ſpeak the truth, the "whole truth, and nothing but the truth."

Rule the Firſt.

This examination, which is for the purpoſe of impeaching the witneſſes competency, and thereby preventing him from being ſworn in chief, is allowed in *criminal* as well as in civil caſes.

As in lord LOVAT's caſe impeached before the lords of England for high treaſon, 20 *Geo.* 2. a witneſs was

examined by the priſoner on the *voire dire*. 9 *St. Tr.* *639, *689, *704, *705.

So in the KING, *v.* DURHAM and CROWDER, *December ſeſſions, Old-Bailey*, 1787. *Leach Cr. Ca.* 2 *Edit.* 375. 3 *Edit.* 538. *Ante* 108.

Rule the Second.

An objection to competency in ſtrictneſs, ſhould be made by an examination into the intereſt of the witneſs upon the *voire dire*, before he is ſworn in chief.

In ABRAHAMS *qui tam*, *v.* BUNN, *Trinity*, 8 *Geo. B. R.* the witneſs whoſe competency was impeached, had previouſly been examined and croſs examined.

Lord MANSFIELD ſaid, in ſtrictneſs the objection came too late; and the ſtrictneſs of law in this caſe is wiſe, and ought to be more adhered to; for the relaxation may be abuſed, and muſt always occaſion waſte of time. *Ante* 109.

This ſtrictneſs however, ſeems to be confined to civil caſes. In proſecutions for offences, whenever the incompetency of a witneſs appears, the court will arreſt his evidence, and direct the jury to diſcharge their minds from his teſtimony. The difficulty of a jury diveſting themſelves of the impreſſion, which facts ſworn to muſt affect, ſhews that wherever the objection can be made upon the *voire dire*, it ſhould never be omitted; for the defendant muſt receive a benefit from the deciſion of the court, even though the opinion went no further than that the objection affected only the credit of the witneſs.

Rule the Third.

An examination on the *voire dire* can only go to eſtabliſh whether the witneſs can *gain* or *loſe* by the matter in controverſy, and if it appears that he is unconcerned, his teſtimony is allowed, otherwiſe not. *Blount, Jacob, Cunningham's, Cowele. Edit.* 1727, *Dictionaires.*

Rule the Fourth.

On a *voire dire* a witneſs may be examined by the *court*, if he be not a party intereſted in the cauſe, as well as the perſon for whom he is a witneſs. *James de Ley.*

This has been often done, where a witneſs not otherwiſe to be excepted againſt, is ſuſpected of partiality. *Ibid.*

Rule the Fifth.

Where it appears to the court that the queſtion to be put to the witneſs on the *voire dire*, goes to affect his credit, and not to impeach his competency, the court will not allow it to be put.

As in the KING, *v.* CHRISTOPHER LAYER, Eſq; *B. R. Michaelmas* 9 *Geo.* 1. Indicted for high treaſon.

Stephen Lynch being produced as a witneſs on the part of the crown; Mr. *Layer*, the priſoner, deſired he might be examined on the *voire dire*, whether he had a promiſe of pardon or ſome other reward for ſwearing againſt him.

PRATT, C. J. ſaid, the queſtion could not be aſked.

Hungerford and *Kettleby*, the aſſigned counſel for the priſoner, argued for putting the queſtion, that a perſon propoſed as a witneſs, muſt be a credible legal witneſs, not convicted of perjury, or any infamous offence, and under no reſtraint for the offence he accuſes another of, and therefore it was matter of right to aſk the witneſs on the *voire dire*, whether he acted under the influence of promiſe, of pardon, or reward; and to ſhew that ſuch promiſe rendered a witneſs incompetent, he cited 2 *Hale's P. C.* 280. *Kelyng* 18.

They alſo cited the *King*, v. *Donell*, *Gordon*, and *Kerr*, and the *King*, v. *Palmer* and *Symonds*, for murder, at *Worceſter*. In the laſt caſe, a third perſon concerned in the fact came in as a witneſs againſt the other two, and after argument on the authority of *Hale*, the witneſs was ſworn upon the *voire dire*, and aſked the queſtion now propoſed.

The *attorney* and *ſolicitor-general*, and *Pangelly* and *Cheſhire*, ſerjeants, anſwered, that the objection only went to the credit of the witneſs, and the caſes cited went no further: therefore it was not proper to be aſked upon the *voire dire* to prevent the witneſs from giving evidence, but when ſworn it might be put to him to weaken his credit. Every man is bound in juſtice to give evidence if required, and a promiſe of pardon can be looked on only as an inducement to do that which by law he ought to do according to the truth, and does not import that he is to give falſe evidence. They admitted the opinion of *Hale*, but obſerved, that all the other judges differed from him. The reaſon of the thing as well as the law, repelled the claim of putting the queſtion. No queſtion is to be aſked a man upon a *voire dire* but to a fact that would take off his teſtimony; a promiſe of pardon made, upon condition that a man ſhould give evidence, no more diſables him from being a witneſs, than that the condition had been, that he ſhould declare the truth; and if they ſhould aſk, whether he accepted a pardon on condition to give falſe teſtimony, he would not be bound to anſwer, becauſe that would be to accuſe himſelf of an act which is unlawful.

Hungerford and *Kettleby* in reply. Whatſoever perſon is produced in a court of juſtice for a witneſs, muſt be utterly unconcerned in point of *intereſt* in the event of the trial. VIDE *Ante, ca. 7. ca. 9.*

If a man produced as a witneſs to prove the debt upon the defendant, ſhall upon a *voire dire*, diſcloſe that he is to have part of the money recovered, he cannot be examined. Now the promiſe of pardon is a greater bias than a promiſe of money. In a civil cauſe, the queſtion is not, whether the witneſs be tempted to ſwear a truth or falſehood, but whether he be ſo far concerned in intereſt, that he ought not to be examined: and therefore the priſoner is intitled to have anſwer, whether *Lynch* hath the promiſe of a pardon, or any reward for the evidence he is to give againſt the priſoner; he is intitled to an *anſwer*, whether the queſtion goes to his *competency* or to his *credit*.

Sir

Sir JOHN PRATT, C. J. EYRE, POWIS, and FORTESCUE ALAND, juſtices, held, that the objection went only to the *credit* of the witneſs, which muſt be left to the jury: but the promiſe of pardon was no objection either to his competency or his credit. It was not a proper queſtion to aſk on the *voire dire*, becauſe if he had ſuch promiſe it was either to ſpeak the truth, or to ſpeak a falſehood. If it were to give a juſt and true evidence, there was no harm in it; and if it was for ſpeaking that which was not true, the witneſs was not bound to anſwer the queſtion. The witneſs was examined. VIDE *ca.* 7. *Ante* 52. *ca.* 9. *Ante* 105. *Alſo, Vide index, words accomplice, pardon, reward, and the pages therein referred to.* 6 *St. Tr.* 257.

NOTE. A *juror* may alſo be examined on the *voire dire* as to his having a freehold. The *King*, v. *Francia.* 6 *St. Tr.* 59.

CHAPTER XI.

How far, and under what circumſtances infants are admiſſible witneſſes.

Rule the Firſt.

CHILDREN under the age of fourteen years are *not*, as of courſe admitted as witneſſes. But there is no time fixed wherein they are to be admitted: for the reaſon and ſenſe of their evidence, is to appear from the queſtions propounded and the anſwers to them. Of this opinion is *Hale.* 2 *P. C.* 278.

HALE ſays, if an infant be of the age of fourteen years, he is as to this purpoſe of the age of diſcretion to be ſworn as a witneſs; but if under that age, yet if it appears that he hath a competent diſcretion he may be ſworn. 2 *Hales P. C.* 278.

And therefore, in ſome caſes, an infant of nine years of age has been allowed to give evidence. For though under fourteen, yet if he be *intelligent*, or the *nature of the*

the fact may allow an examination of one under that age he may be examined upon oath as a witneſs: as in caſe of rape or buggery; and the like may be in the rape of one under ten years, upon the ſtatute 18 *Eliz. ca.* 6. *Iriſh* (which makes the age of the girl carnally known twelve years). And the like hath been done in caſe of buggery upon a boy, upon the ſtatute 25 *Hen.* 8. *ca.* 6. *Iriſh* 10 *Car.* 1. *ca.* 20. *ſeſſ.* 2. 2 *St. at large* 81. And ſurely in ſome caſes, one under the age of fourteen years, if otherwiſe of a competent diſcretion, may be a witneſs in caſe of treaſon. 1 *Hale's P. C.* 302. 2 *Hawk. P. C. ca.* 46.

And in the caſe of a rape committed upon an infant of ſuch tender years, that ſhe has not ſufficient underſtanding to be admitted to give teſtimony on oath, it was formerly held, that the *information* which ſhe gave to others of the fact and circumſtances, might be given in evidence by thoſe to whom ſhe made the communication.

HALE objects to this mode of proceeding, and ſays, that if the party injured be an infant of ſuch tender years, that in point of *diſcretion* the court ſees it unfit to ſwear her, yet ſhe ought to be heard *without oath* to give the court information, though ſingly of itſelf it ought not to move the jury to convict the offender, nor is it in itſelf a ſufficient teſtimony, becauſe *not upon oath*, without concurrence of other proofs that may render the thing probable. He then gives three reaſons.

Firſt, the nature of the offence, which is moſt times ſecret, and no other teſtimony can be had of the very doing of the fact, but the party upon whom it is committed, though there may be other concurrent proofs of the fact when it is done.

Secondly, becauſe the child complains preſently of the wrong done to her, to the mother or other relations, their evidence upon oath ſhall be taken, yet it is but a narrative of what the child told them without oath, and there is much more reaſon for the court to hear the relation of the child herſelf, than to receive it at ſecond hand from thoſe that ſwear they heard her ſay ſo; for ſuch a relation may be falſified, or otherwiſe repreſented at the ſecond hand, than when it was firſt delivered.

But

But in both theſe caſes, whether the infant be ſworn or not, it is neceſſary to render their evidence credible, that there ſhould be concurrent evidence to make act the fact, and not to ground a conviction ſingly upon ſuch an accuſation, *with* or *without* the oath of an *infant*. 2 *Hale's P. C.* 634, 635.

In YOUNG, *v.* SLAUGHTERFORD, *Trinity*, 8 *Anne*, at Bar, in an appeal *of murder*. Where a witneſs under twelve years of age being produced to give evidence againſt the appellee, was objected to; but HOLT, C. J. ſaid, if he knew the danger of an oath he might give evidence, and that appearing he was admitted as a witneſs. 11 *Mod.* 228.

And, it is now ſettled, that if an infant appear, by anſwers propounded by the COURT for the purpoſe, to entertain ſufficient ſenſe of the danger and impiety of ſwearing falſely, ſhe may be ſworn and examined at any age.

Rule the Second.

But the *Infant* muſt be ſworn—

This appears in the caſe of *Omichund*, v. *Barker*, on ſir *Dudley Ryder's* quoting *Hale* as an authority, that a child incapable of conſidering the obligation of an oath might be ſworn, was interrupted by LEE, C. J. who ſaid it had been determined at the *Old-Bailey*, upon mature conſideration, that a child ſhould not be admitted as a witneſs without oath. And on the ſame occaſion, PARKER, C. B. likewiſe ſaid, it was ſo ruled at *Kingston* aſſizes before lord RAYMOND, where upon an indictment for a rape, he refuſed the evidence of a child without oath. 1 *Atkyns* 21. Vide *Ante* . *Poſt* .

The ſame rule was adhered to in the KING, *v.* POWELL, tried for a rape before GOULD, J. at the aſſizes of *York*, 1775.

The proſecutrix was an infant, between ſix and ſeven years of age; and upon the preſumption of law, that a child under the age of ſeven years is incapable of underſtanding the nature of an oath, and is therefore incompetent to take it, ſhe was admitted to give her evidence againſt the priſoner without being ſworn.

The

The priſoner was acquitted: but the judge conceiving that by the laws of *England*, every conviction muſt be by legal evidence, and that eſpecially in criminal caſes no evidence can be legal unleſs it be *given upon oath*, he mentioned the caſe to the judges, and the majority of them were of opinion, that in criminal caſes no teſtimony can be received except upon oath. *Leach. Cr. Ca.* 2 *Edit.* 104. 3 *Edit.* 129.

The caſe alluded to by lord chief baron PARKER, above cited, was the KING, *v.* TRAVERS, at *Kingston* aſſizes, Lent 1726. *Coram* RAYMOND, C. J. *B. R.*

The defendant was indicted at the preceding ſummer aſſizes, for a rape on a child little more than ſix years old. GILBERT, C. B. refuſed to admit the evidence of the child. At the ſame aſſizes an indictment was found againſt him for an aſſault, with an intent to raviſh the ſame child, and this indictment coming to be tried before RAYMOND, C. J. an objection was again taken to her giving evidence, *viz.* that the girl being but ſeven years of age could not be a witneſs: that it had formerly been held that none under twelve years of age could be admitted: and that a child of ſix or ſeven years of age, in point of reaſon and underſtanding ought to be conſidered as a lunatic.

This objection was thus anſwered, that in *capital* caſes which concerned life, this objection might be allowed; but that in *miſdemeanors* only ſuch a witneſs might be admitted; and the objection went only to the *credit* of the witneſs: and *Hale* ſays, that an infant of nine years old has been admitted. They alſo cited a caſe at the *Old-Bailey*, 1698, where on ſuch an indictment before WARD, C. B. a child under the age of ten years, after the child having been examined about the nature of an oath, and giving a reaſonable account of it, was ſworn and examined.

RAYMOND, C. J. held, that there was no difference betwixt offences *capital* and *leſſer* offences in this reſpect; and that a perſon who could not be a witneſs in *one* caſe could *not* in the *other*. The reaſon why the law prohibits the evidence of a child ſo young is, becauſe the child cannot be preſumed to diſtinguiſh between right and wrong.

wrong. No perſon has ever been admitted as a witneſs under the age of nine years, and very ſeldom under ten. At the *Old-Bailey*, 1704, this point was thoroughly debated, in the caſe of one *Steward*, who was indicted upon two indictments for rapes upon children. The firſt was a child of *ten* years and *ten* months, and yet the child was not admitted as a witneſs, before other evidence was given of ſtrong circumſtances as to the guilt of the defendant, and *before the child had given a good account of the nature of an oath.* The ſecond indictment was attempted to be maintained by the evidence of a child of between ſix and ſeven years of age, but it was agreed that a child ſo young could not be admitted as a witneſs, and ſhe was rejected, without inquiring into circumſtances to give her teſtimony credit. And it was merely upon the authority of *Hale's Pleas of the Crown*, where it is ſaid that a child of ten years of age may be a witneſs. The other child was admitted to be a witneſs on the firſt indictment: the defendant was acquitted. 1 *Strange* 700.

In the KING, *v.* BRAZIER, the point appears determined. He was tried at *ſummer* aſſizes, for *York*, 1778, for a rape on the body of an infant under ſeven years of age.

On the trial the *information* of the infant was received in evidence againſt the priſoner; but as ſhe had not obtained the years of *preſumed diſcretion*, and did not appear to poſſeſs ſufficient underſtanding to be aware of the dangers of perjury, ſhe was not ſworn.

The priſoner was convicted; but reſpited on a doubt whether evidence under any circumſtances whatſoever, could be legally admitted in a criminal proſecution, except upon oath.

The TWELVE JUDGES to whom the point was referred were unanimouſly of opinion, that no teſtimony whatever can be legally received, except upon oath; and that an infant, though *under* the age of ſeven years, may be ſworn in a criminal proſecution, provided ſuch infant appears, upon ſtrict examination by the court, to poſſeſs a ſufficient knowledge of the nature and conſequence of an oath: for there is no preciſe or fixed rule as to the

time within which infants are excluded from giving evidence; but their admiſſibility depends upon the ſenſe and reaſon they entertain of the danger and impiety of falſehood, which is to be collected from their anſwers to queſtions propounded to them by the court: but if they are found incompetent to take an oath, their teſtimony cannot be received.

NOTE. LEACH ſtates, that it appears by a manuſcript note of this caſe, that the child's evidence was not received at all; but that the mother and another witneſs gave evidence of what the child had ſaid at the time. *Leach Cr. Ca.* 2 *Edit.* 182. 3 *Edit.* 237. *Vide the caſe of William York. Foſt.* 70. *Gilb. Law Ev.* 144. *Bull. N. P.* 293.

In the KING, *v.* PATRICK MURPHY, *Old-Bailey, ſeſſions* 1795, indicted for a rape on a child of ſeven years old. RORKE, J. mentioned, that at *Glouceſter* aſſizes, finding that the principal witneſs was an infant, who was wholly incompetent to take an oath, he poſtponed the trial to the following aſſizes, and ordered the child to be inſtructed, in the mean time, by a clergyman, in the principles of her duty, and the nature and obligation of an oath. At the next aſſizes the priſoner was put upon his trial, and the girl being found by the court on examination, to have a proper ſenſe of the nature of an oath, was ſworn, and upon her teſtimony the priſoner was convicted and executed. He added, that upon a conference with the other judges they approved what he had done. *Leach. Cr. Ca.* 3 *Edit.* 482. *Guillim's Edit. Bac. Abr. vol.* 2. *p.* 577. *Notis.*

So in the KING, *v.* ROSE KELLY, *at a commiſſion of oyer and terminer*, for the county of *Dublin, February*, 1802, before lord NORBURY, C. J. C. P. and WILLIAM SMITH, B. for the murder of Ann Murphy, aged five years.

Jane Murphy, a child of ſeven years old was produced as a witneſs.

Jonas Green, for the proſecution, informed the court that it having been found on examining the child, that ſhe was ignorant of the nature of an oath, he had adviſed that a clergyman ſhould be called upon to inſtruct her

her in a knowledge of the DIVINE BEING, the nature of an oath, and of rewards and punishments.

Mac Nally, for the prisoner, said, that so far from censuring, he thought the advice of Mr. *Green* extremely proper and legal, and mentioned the above case, where ROKE, J. had postponed a trial from one assizes to another, in order that an infant might be instructed in the consequences temporal and spiritual, of wilful perjury. He submitted, however, that as the objection went, in the first instance, to competency, of which the court were to determine, that the examination should not be by the counsel, but by the judge.

SMITH, B. examined the child. Do you say your prayers? *Yes, sir.* Who is it you say your prayers to? *My mother, sir.* You pray to GOD Almighty I suppose? *Yes, sir.* If you behave well and act as he would wish you to act, where do you suppose you will go when you die? *To Heaven, sir.* Do you suppose you would go to Heaven if you told a lie? *No, sir.* Where do you think GOD Almighty would send you if you told a lie? *To hell, sir.* If you were to swear a lie, which do you think you would go to Heaven or to hell? *To hell.* If we ask you any question just now, which will you tell the truth, or what is not the truth—will you tell the truth? *Yes, sir.* And you believe that GOD disapproves of telling lies? *Yes, sir.* And of course you will not tell a lie? *No, sir.* And you wish to do what will please GOD. *Yes, sir.*

The COURT thought there could be no objection to tendering this child an oath; and had no doubt but she had sufficient understanding.

Mac Nally—the object for consideration is her understanding. She has distinguished Heaven from hell in her answers; but to render her competent, she should shew a religious knowledge of the rewards and punishments of a future state. If she does that, no doubt she is a competent witness, and her credit must go to the jury.

SMITH, B. (to the witness.) Which would you rather conduct yourself so, as to go to Heaven or to hell? *To Heaven, sir.* She was then sworn, and gave strong and consistent evidence; which being corroborated by other witnesses, who also proved a chain of facts against

the priſoner, connecting the moſt concluſive guilt, and the priſoner calling no witneſs to fact or to character, ſhe was convicted and executed the Monday following.

NOTE. By the laws of INA, a child of ten years old was allowed to be a witneſs in theft. *L. L. Inæ lib.* 7.

CHAPTER XII.

On the competency of Aliens, Villeins or Bondſmen.

Rule.

IT is not a legal exception to a witneſs, that he is an alien, a villein, or a bondſman.

So ruled in the caſe of THOMAS HOWARD, duke of NORFOLK, 13 *Eliz.* for high treaſon before his peers. His grace objected to the competency of the biſhop of *Roſſe*, and one *Rodolph*; and quoted *Bracton*, to ſhew that witneſſes muſt be *legates*, lawful men; and ſuch, he ſaid, ſtrangers could not be, and ſuch ſtranger charged him.

Catlin anſwered the duke, and it appears the JUDGES aſſented, that an alien, a ſtranger, and a bondſman, may be a witneſs, and *Bracton* was cited as the authority. 1 *St. Tr.* 113. Vide *Omichund*, and *Barker*, *ante*.

CHAPTER XIII.

On the examination of perſons Deaf and Dumb.

Rule.

A PERSON deaf and dumb, to whoſe mind has been conveyed the knowledge of a DEITY, and a belief of rewards and puniſhments, may be examined as a witneſs,

neſs, through the medium of a perſon capable of converſing with him by ſigns.

As in the KING, *v.* WILLIAM BARTLETT, *Old-Bailey, January ſeſſions*, 1786, indicted for grand larceny.

John Ruſton, a man *mutus et ſurdus a nativitate*, was produced as a witneſs on the part of the crown.

Martha Ruſton his ſiſter, being examined on the *voire dire*, it appeared that ſhe and her brother, for a ſeries of years had been able to underſtand each other, by means of certain arbitrary ſigns and motions, which time and neceſſity had invented between them. She acknowledged that theſe ſigns and motions were not ſignificant of letters, ſyllables, words, or ſentences, but were expreſſive of general propoſitions, and intire conceptions of mind; and that the ſubjects of their converſation had in general been confined to the domeſtic concerns and familiar occurrences of life. She believed, however, that her brother had a perfect knowledge of the tenets of chriſtianity, and was certain that ſhe could communicate to him true notions of the moral and religious nature of an oath, and of the temporal dangers of perjury.

The priſoner's *Counſel* objected, that although theſe modes of conveying intelligence might be capable of impreſſing the mind with ſome ſimple ideas of the exiſtence of a GOD, and of a future ſtate of rewards and puniſhments, yet they were utterly incapable of communicating any perfect notions of the vaſt and complicated ſyſtem of the chriſtian religion, and therefore the witneſs could not, with propriety, be ſworn upon the holy goſpels.

The difficulty of arraigning a man for perjury, whom the law preſumes to be an idiot, and who is conſequently incapable of being inſtructed in the nature of the proceedings againſt him, was alſo urged againſt the admiſſibility of the witneſs.

The COURT, preſent HEATH, J. over-ruled the objection, and *John Ruſton* was ſworn in the uſual way, and "*Martha Ruſton* well and truly to interpret to *John* "*Ruſton*, a witneſs here produced, in behalf of the "king, againſt *William Bartlett*, the priſoner at the bar, "the queſtions and demands made by the court to the "ſaid

& ſaid *John Ruſton*, and his anſwers made to them." The priſoner was found guilty. *Leach's Cr. Ca.* 2 *Edit.* 316. 3 *Edit.* 455.

So in the KING, *v.* ELIZABETH STEELE, *Old-Bailey, May ſeſſ.* 1787. It was held by the twelve JUDGES, that a priſoner mute by the viſitation of GOD, on the fact being found by a jury, may be tried, found guilty, and ſentenced. 3 *Leach Cr. Ca.* 3 *Edit.* 507. 2 *Hale P. C.* 317.

CHAPTER XIV.

On the diſability of Idiots and Lunatics.

Rule.

SOME are diſabled from being witneſſes in regard of defect of intellectuals. A perſon of *non-ſane memory*, cannot be a witneſs while he is under that inſanity; but if he have *lucida intervella*, then under the time he hath underſtanding he may be a witneſs. But it is a difficulty ſcarcely to be cleared, what is the *minimum, quod ſic* diſables the party. *Co. Litt.* 6 *b.* 2 *Hale's P. C.* 278. Vide 4 *Black.* 24. *Leach Cr. Ca.* 3 *Edit.* 507.

CHAPTER XV.

On the Examination of Peers in criminal Caſes.

Rule the Firſt.

PEERS of the realm have no privilege, and where examined as witneſſes either in civil or criminal caſes, they are not exempted from taking an *oath*, but muſt be ſworn in the ſame manner and form as other witneſſes are. 3 *Keb.* 61.

For

For the reſpect which the law ſhews to the credit of a peer, does not extend ſo far as to overturn a ſettled maxim, that *in judicio non creditur niſi juratus.* 1 *Blackſ. Com.* 402.

As in the caſe of ſir THOMAS MEERS, *v.* lord STOURTON, in *Canc.* Sir *Thomas Meers* exhibited a bill againſt lord *Stourton*, and it was ordered, that lord *Stourton* ſhould be examined upon interrogatories touching his title. It was objected, that he being a *peer* of the realm, ought to anſwer upon his honour only.

HARCOURT, lord-keeper, ruled, that where a peer is to anſwer to a bill, his anſwer put in upon his honour is ſufficient; but where a peer is to anſwer interrogatories to make an affidavit, or to be examined as a witneſs, he muſt be upon his oath. 2 *Salk.* 512, 513. 1 *Peere Will.* 146. *S. C.*

In the earl of LINCOLN's caſe, in the *Star-chamber*, 1626, the juſtices of both benches (except *Doderidge*) being preſent, and all the barons of the exchequer, and a great aſſembly of lords of the privy council; it was moved—whereas ſir *Henry Fines*, knight, had exhibited his bill in the ſtar-chamber againſt the earl of *Lincoln*, for divers riots and other miſdemeanors, and the earl of *Lincoln* had taken a commiſſion forth to put in his anſwer *upon oath* in the country, and he offered before them his anſwer *upon his honour*, but would not put it in upon oath, becauſe he was a peer of the realm; which matter being now reported by the commiſſioners, it was held by all the juſtices, who delivered their opinion *ſeriatim*, that the lords, in caſes criminal, eſpecially where the king is party, ought to put in their anſwer upon oath; and in all caſes where they are to be witneſſes, between party and party, they ought to be ſworn. And the lord keeper ſaid, *quod in judicio non creditur niſi juratus*, and that he had cauſed precedents to be ſearched, and had found divers ſince the firſt of queen *Elizabeth*, wherein peers of the realm having been impleaded in chancery, or ſtar-chamber, or court of wards, have been always ſworn: and he ſaid, when a peer affirms any thing which is not true upon his honour, there is not any remedy; but if he affirms that which is falſe upon his oath, there

is remedy by the 5 *of Eliz. ca.* 9. againſt perjury: wherefore they all reſolved, that the earl of *Lincoln* ought to be ſworn. All the lords and counſellors were of the ſame opinion, which they delivered *ſeriatim*, *nullo contradicente*, becauſe it is *juramentum purgationis*, and not *promiſſionis*; and princes are ſworn to all their leagues and confederacies, which is called *juramentum confirmationis*; neither is it any diminution to the earl's honour to be ſworn about that which he would not, ſhould he be put upon his honour. *Cro. Car.* 64. *Hutton* 87. *Jones* 1, 2, 154. *Ord. Chan.* 40. 2 *Equit. Caſ. ab.* 14. *pl.* 4. *Mitford's Plead.* 9.

Rule the Second.

And if a peer refuſes to be ſworn, and give evidence either before the grand or petit jury, he may be fined and committed for a contempt of court.

As in the KING, *v.* lord PRESTON, *Mich.* 3 *Will. & Mary*, *B. R.* His lordſhip was committed by the court of quarter ſeſſions, for refuſing to be ſworn to give evidence to the grand jury, on an indictment for high-treaſon; and was brought by *habeas corpus* into the king's bench.

HOLT, C. J. ſaid, it was a great contempt, and that had he been there he would have fined him, and would have committed him until he had paid the fine. 1 *Salk.* 278.

CHAPTER XVI.

Of objections to the competency of Witneſſes, on account of proximity to the party on trial.

Rule the Firſt.

HUSBAND and wife being, in contemplation of law, as one and the ſame perſon in affection and in intereſt, can no more give evidence *for* one another in any caſe whatſoever,

whatſoever, than for themſelves; nor ſhall the one be admitted to give evidence *againſt* the other, even where ſuch evidence only tends to criminate, and in collateral caſes. 2 *Term. Rep.* 268.

As in the KING, *v.* MARY GRIGGS, *Mich.* 12 *Car.* 2. *B. R.* The defendant was indicted upon the ſtatute of *Jac.* 1. *ca.* 11. *Iriſh* 10 *Car.* 1. *c.* 21. for that ſhe, the 28*th* of *February*, 1653, was married to one *Nicholas Coates*, and that ſhe afterwards, to wit, on the 10*th* of *October*, 1659, her firſt huſband being then alive, married *Edward Cage*, &c.

Upon not guilty pleaded, the firſt huſband was produced as a witneſs at the trial, to prove the firſt marriage; but the court refuſed his teſtimony, and ſaid, that a wife could not be permitted to give evidence againſt her huſband, nor the huſband againſt his wife in any caſe excepting treaſon, becauſe it might occaſion implacable diſſention, according to 1 *Inſt.* 6. *b.* The priſoner was acquitted.

In the above caſe the court denied lord *Audley*'s caſe to be law.

Baron GILBERT on this ſubject ſays, if they ſwear for the benefit of each other, they are not to be believed, becauſe their intereſts are abſolutely the ſame; and therefore they can gain no more credit when they atteſt for each other than when any man atteſts for himſelf. *Gilb. Evid. by Loft*, 252.

And it would be very hard that a wife ſhould be allowed as evidence againſt her huſband, when ſhe cannot atteſt for him: ſuch a law would occaſion implacable diviſions and quarrels, and deſtroy the very legal policy of marriage, that has ſo contrived it that their intereſt ſhould be but one; which it could never be, if huſbands were permitted to deſtroy the intereſts of the wife, nor could the peace of families be well maintained if the law admitted any atteſtation againſt the huſband. *Ibid.*

BLACKSTONE coincides. Huſband and wife, in trials of any ſort, are not allowed to be evidence for or againſt each other: partly becauſe it is impoſſible their teſtimony can be indifferent, but principally becauſe of the union

of perſon: and therefore if they were admitted to be witneſſes *for* each other, they would contradict one maxim of law, "*nemo in propria cauſa teſtis eſſe debet*," and if *againſt* each other, they would contradict another maxim, "*nemo tenetur ſeipſum accuſare.*" 1 *Comm.* 443.

Rule the Second.

Nor can the *examination* of the one, be made uſe of againſt the other.

But where either huſband or wife have cauſe to demand ſureties of the peace againſt each other, each may give evidence againſt the other of the cauſe on which ſuch ſureties are demanded. *Hutt.* 16. *Bull. Niſi Pr.* 287. 1 *Term. Rep.* 69. 1 *Burr.* 635.

The reaſon for theſe rules in reſpect to huſband and wife, is founded in found policy, and is to prevent the implacable diſſention which might be cauſed by admitting witneſſes for or againſt each other, and the great danger of perjury, from taking the oaths of perſons under ſo great a bias, and extreme hardſhips of the caſe. 2 *Hawk. Pl. Cr. ca.* 46. 2 *Hale P. C.* 279. *Co. Litt.* 6. 112, 187. 2 *Vern.* 79.

Rule the Third.

Neither is a wife bound to be ſworn, or to give evidence againſt another in caſe of theft, &c. if her huſband be concerned, though it be *material againſt* another and not *directly* againſt her huſband. 1 *Hale Pl. Cr.* 301. *Dalt. old Edit. ca.* 111. *New Edit. ca.* 164. *p.* 543. 2 *Term. Rep.* 268. *Poſt*

Rule the Fourth.

Where there are ſeveral joint defendants to one indictment, the wife of one of the defendants is not a competent witneſs to be examined for any of the others.

As in the KING, *v.* FREDERICK and TRACEY, *Trinity*, 11 *Geo.* 2. The defendants were indicted for a joint aſſault. At the trial it was inſiſted to examine the wife of

of the defendant *Tracey*, as a witneſs for the other defendant: but there having been material evidence againſt the huſband, and it being a joint treſpaſs, and impoſſible to ſeparate the caſes of the two defendants in the account to be given of the tranſaction, the chief juſtice refuſed to let her be examined. 2 *Stra.* 1095.

On thoſe rules it has been determined, *ex parte*, *James*, *Hil.* 1719, that the wife of a bankrupt cannot be examined againſt her huſband, touching his bankruptcy. She, by the common law, cannot be a witneſs for or againſt her huſband; and though bankrupt ſtatutes authorizes the commiſſioners to examine the wife, touching any concealment of the goods, effects, or eſtates of the bankrupt, yet they do not extend to examine the bankrupt's wife, touching his bankruptcy, or whether he had committed any act of bankruptcy, or how and when he became a bankrupt. 1 *Peere Will.* 610, 611. 12 *Vin. Abr.* 11. *pl.* 28. *S. P.*

So in an information againſt two for perjury, and another for ſubornation of perjury, in ſwearing on the trial of an ejectment that a child was ſuppoſitious, the huſband of one of the defendants was permitted to give evidence of the *birth*, but his evidence as to the ſubornation of perjury was rejected. 1 *Sid.* 377. 2 *Keb.* 403. *March* 120.

The KING, *v.* the INHABITANTS of CLIVIGER, furniſhes a determination on the point, and a retroſpect to all the authorities of weight upon the queſtion.

Two juſtices removed, by an order, *James Whitehead*, otherwiſe *Shepherd*, and *Margery* his wife, from the townſhip of Anlegark to Cliviger, both in the county of Lancaſter; on an appeal to the ſeſſions, that order was confirmed, ſubject to the opinion of the court on the following caſe:

As to ſo much of the order as reſpected the ſettlement of *Margery*, therein named to be the wife of *James Whitehead*. The reſpondents proved the marriage of the paupers, *James* and *Margery*, on the 6th of *September*, 1786, and then cloſed their caſe. The appellants inſiſted, that *James Whitehead*, the pauper, had a former wife, *Ellen*, living at the time of his marriage with

Margery, and called *James Whitehead* to prove it, who ſwore that he never was married to the ſaid *Ellen*. The appellants then offered to call the ſaid *Ellen*, ſtating her to be the lawful wife of the ſaid *James Whitehead*, to contradict what he her ſuppoſed huſband had ſworn; and to ſwear that ſhe was his lawful wife; but the ſeſſions under the circumſtances refuſed to receive her evidence. The appellants then went into evidence of cohabitation between *Ellen* and *James*, for a period of three or four years; of declarations and acts of *James* acknowledging *Ellen* to be his wife, and amongſt others an indenture of apprenticeſhip, dated 24th of Auguſt, 1785, was proved by the ſaid *James* and the ſaid *Ellen*, therein deſcribed to be his wife, whereby was bound out apprentice one *Thomas Williams*, the ſon of the ſaid *Ellen*, by one *Joſeph Williams* formerly her huſband, but then deceaſed.

The queſtion referred to the court is—whether the ſaid *Ellen* was a competent witneſs or not.

S. Heywood and *Topping* in ſupport of the order of ſeſſions. The real queſtion is, whether a wife is a competent witneſs, even in the caſe of third perſons, to prove her huſband guilty of bigamy? beſides the objection of her being intereſted in the *queſtion* which was put to her, in as much as ſhe was called to prove, that a perſon whom ſhe called her huſband was liable to her debts and for her maintenance.

The policy of the law will not permit huſband and wife to give evidence tending to the crimination of each other. Here the evidence of the wife went to charge her huſband with bigamy.

The broad rule is laid down in *Buller's Niſi Prius*, where it is ſaid, that huſband and wife cannot be witneſſes for each other, becauſe their intereſts are abſolutely the ſame, nor againſt each other, becauſe it is contrary to the legal policy of marriage. *Niſi Pr.* 286.

And on this latter ground lord HARDWICKE, in the caſe of BARKER, *v.* DIXIE, refuſed to let the plaintiff's wife be examined, although it was with the defendant's conſent. *Rep. Temp. lord Hardw.* 264.

So

So in *Coke Littleton*, it is ſaid to have been reſolved by the juſtices, that a wife cannot be produced againſt her huſband, for it might be the cauſe of implacable diſcord and diſſention between them, and the means of great inconvenience. *Co. Litt.* 6. *b.* *Sir T. Raym.* 1. 2 *Stra.* 1095. *Ante*

The caſe of BROUGHTON, *v.* HARPUR, 13 *Will.* 3. is expreſsly in point, there in ejectment, tried before GOULD, juſtice, the leſſor of the plaintiff made title as ſon and heir of *J. Jacques* and *Hannah* his wife, in right of *Hannah*. The defendant offered to call a woman to prove that *J. Jacques* was then living, was married to her before he was married to *Hannah*, and ſhe was accordingly admitted. However, a verdict was found for the plaintiff. But the ſame caſe upon the very ſame title, between the ſame parties, came on again at the following ſpring aſſizes before HOLT, chief juſtice, 1 *Anne*, when this woman being again offered to the ſame fact, he rejected her: but the defendants proved it by other evidence and obtained a verdict. 2 *Lord Raym.* 752.

It does not appear from the report, whether the cauſe came on the ſecond time upon a new trial granted by the court, though it very probably did; but at any rate it muſt have been on mature deliberation, and a perfect conviction of the impropriety of receiving ſuch evidence, otherwiſe lord HOLT would not have ruled as he did ſo recently, after a contrary determination on the very ſame point, in the ſame caſe, by another judge.

In BENTLY and COOK, *Trinity*, 24 *Geo.* 3. in this court the ſame principle has been ſtrongly recognized. There in an action by the plaintiff as *feme ſole*, for goods ſold and delivered, the defendant called the huſband as a witneſs, to prove that ſhe was a married woman, and he was admitted and the plaintiff was non-ſuited. On a motion to ſet aſide the non-ſuit, the majority of the court thought that he was not admiſſible, on the ground of policy; BULLER, juſtice, doubted at firſt upon the ground, that the huſband was not intereſted in that caſe, but he afterwards acceded to the opinion of the court, upon the broad ground adopted by them, of the impolicy

of

of permitting husband and wife to give evidence for or against each other.

It is plain, that *interest* alone, in the event of the suit, is not the true criterion in cases of this sort. Where a person becomes a bankrupt, all interest ceases; and if this kind of objection had been founded merely on that ground, a wife would have been a good witness to prove effects the property of her husband before his bankruptcy, but it has been ruled otherwise, and therefore it was necessary to have an act for that purpose. *Brownl.* 47. *Ante* . *Stat.* 21 *Jac.* 1, *ca.* 19.

So that the argument which may be urged on the other side, that the husband could not be affected by this evidence, in as much as it could not be made use of on any other occasion, cannot have any weight; for if it tends to *prejudice* him in any *degree* that is sufficient. It would certainly have raised impressions against him; and, indeed, it would have been the duty of the justices to have committed him after having heard it.

There may possibly be some cases where a wife may give evidence on behalf of third persons, which may obliquely affect her husband, but certainly none where it *tends* to impute any crime to him. In trover for goods, a wife would not be permitted to say her husband *stole* them and gave them to the defendant. But a woman may prove the legitimacy of her child, because there is no *interest* to herself, and no *crime* alledged against her husband.

In HALE it is laid down, that a woman is not bound to give evidence against another in case of a theft or any other crime, if her husband be concerned, though it be materially against another, and *not* directly against her husband. 1 *Pl. Cr.* 301. *Ante* .

Now if the charge could not be obliquely made in one instance, there is no reason why it should be in another; and there is no instance in which the wife could prove the same fact in an action which she could not do in an indictment against a third person, and there is no reason for any distinction. Neither is there even the plea of *necessity* in this case, for the same fact might have been

been eſtabliſhed by other evidence as by the regiſter of marriage.

Bearcroft, *Cockrell*, and *Johnſon*, contra. The objection goes to the *credit*, not to the *competency* of the witneſs. The courts have leaned very much to this rule of late years, particularly as more conducive to the ends of juſtice. *Abrahams* and *Bunn*. 4 *Burr*. 2251. *Ante* .

In order to form a right opinion upon competency, it is neceſſary to conſider who were the parties; what was the matter in iſſue, and the queſtion put to the witneſs. The parties to the cauſe were the two ſeveral pariſhes; the matter in iſſue was a queſtion of ſettlement; which differs this from all other caſes, for greater latitude is here allowed. The parties themſelves whoſe ſettlement is in queſtion, have ever been allowed as witneſſes, and therefore the pariſh of Cluiger had a right to the teſtimony of this woman. That being the caſe, and neither the huſband nor wife being in any degree intereſted in the event, the ſimple queſtion is—whether a woman is a competent witneſs to prove her marriage? There are many caſes to that effect, and it has always been the conſtant practice to call huſband and wife to prove that fact. *Bull. N. P.* 287.

It would be a ſtrange abſurdity indeed, if the event of a cauſe were decided by the circumſtance of calling this or that perſon firſt, whether by accident or deſign. It might be turned to very bad purpoſes to encourage ſuch a diſtinction. Great inconveniencies would ariſe to third perſons, if they were to be ſtruck out from receiving the benefit of another's teſtimony by ſuch means. The circumſtance is likely to occur frequently in the caſe of wills. In caſe of an indictment for bigamy, the firſt wife's evidence is not admiſſible, becauſe it goes to charge her huſband directly: but here nothing that the woman could ſay could affect her huſband; no proſecution could be grounded on her teſtimony; neither was there any benefit to herſelf. And as to its being the duty of the juſtices to commit the huſband in caſe of ſuch evidence having been given, it is no objection to third parties proving their caſe, that the juſtices may interfere in another ſhape. In the caſe of BENTLEY, *v.* COOK, where the

the husband's testimony was held to be inadmissible, he was clearly interested. One of the two cases cited from lord *Raymond*, seems indeed to support the objection; but that can have no weight, for at any rate it is only an opinion thrown out at *Nisi Prius*, upon evidence which was unnecessarily tendered; for the same fact was established afterwards by other means: and besides it is contradicted by another case, where the facts were similar, decided the other way. As to the other objection, there is no such rule as that a party may not call a second witness to contradict his first. It is in every day's practice to do so. Sometimes, indeed, where several witnesses have been called by one party, who give evidence against him, the judge will signify his disapprobation to his calling any more; but it would be hard indeed, if the rights of parties in a cause were to depend upon the first witness whom they happened to call. It would be an incitement to perjury, as such a witness would be worth gaining at any rate.

Ashurst, J. There is no doubt, but that husband and wife may prove their own marriage on a question of settlements. But this case rests upon particular circumstances. A marriage in *fact* had been proved with one woman—the question was, whether she was the pauper's lawful wife? then another woman was called to prove that she had been before married to him, and was in truth his lawful wife. That creates the doubt, whether it was competent to the wife to prove, that her husband had been twice married. Under these circumstances, she was not a competent witness to that purpose. It has been long established, that the question of settlement raises no *interest* in the parties whose settlement is in dispute, therefore the consideration of *interest* is out of the case. For though the evidence of the woman would have gone to shew that her husband was liable to maintain her, yet that objection would have gone to her *credit* and not to her *competency*, because it would be of no avail on any other trial. But the ground of her competency arises from a principle of public policy, which does not permit husband and wife to give evidence that may even *tend* to *criminate* each other. The objection is

not

not confined merely to caſes where the huſband or wife are directly accuſed of any crime; but even in collateral caſes, if their evidence tends that way, it ſhall not be admitted. Now here the wife was called to contradict what her huſband had before ſworn, and to prove him guilty of perjury as well as bigamy, ſo that the *tendency* of her evidence was to charge him with two crimes. However, though what ſhe might then ſwear could not be given in evidence on a ſubſequent trial for bigamy; yet her evidence might lead to a charge for that crime, and cauſe the huſband to be apprehended. In that point of view, therefore, her teſtimony ought not to have been received, becauſe it is an eſtabliſhed maxim, that huſband and wife ſhall not give evidence to criminate each other.

Thus far upon principle.—But beſides the *Niſi Prius* caſe before, lord HOLT ſeems to have great weight: for though there is the opinion of another judge the other way, yet the one deciſion immediately follows the other, and being between the ſame parties, and upon the ſame title, the firſt might have become a matter of diſcuſſion between the judges; and probably on the ſecond trial, Mr. juſtice *Gould* would have ruled in the ſame manner as lord *Holt* did. Upon the whole, the objection is well founded.

GROSE, J. In this caſe the wife was called profeſſedly for the purpoſe of proving that her huſband was guilty of bigamy. The queſtion is—whether ſhe was a competent witneſs to prove that fact.

The diſtinction between competency and credit is by no means accurately ſettled; in many of the books the ſhade between them is ſo light, that the boundaries of either can hardly be perceived. But in all the books which treat of evidence, there are certain technical rules laid down, which are highly beneficial to the public, and ought not to be departed from. Some of theſe relate to huſband and wife: and we find the general rule as to them to be founded, *not* on the ground of *intereſt*, but of *policy*; by which it is eſtabliſhed, that a wife ſhall not be called to give teſtimony in any degree to criminate her huſband. Lord *Hale* ſays, ſhe ſhall not be

called even *indirectly* to criminate him, and that rule ſeems to have governed all the deciſions from that time to the preſent. *Vide Rules. Ante*

The caſe in lord RAYMOND is very much in point. It is not merely to be conſidered one *Niſi Prius* caſe contradicted by another. The report ſhews, that the ſecond cauſe came on upon a new trial, for it ſays, "the ſame "cauſe" came on to be tried before *Holt*. On the firſt trial the queſtion was conſidered by *Gould*, juſtice, on the ground of *intereſt*, and conſidering it merely in that light, he might have done right in over-ruling it? but the true and beſt ground of objection is not that of *intereſt*, but is founded on the political inconvenience of cauſing diſſentions in families between huſband and wife; and ſo it is put by lord *Hale*. In *Hawkins's Pleas of the Crown* the objection is alſo conſidered in the ſame view, and my lord *Hardwicke* adopted it in the caſe before him. Since that time, in *Bently*, v. *Cook*, the determination of the three judges was on the broad ground of the public inconvenience, ariſing from the admiſſion of ſuch teſtimony. Mr. juſtice *Buller* doubted at firſt in that caſe, becauſe he thought there was no *intereſt* in the party; but on further conſideration he gave into the opinion of the other judges, upon the general principle which governed them, as it tended to prevent diſſentions in families.

Then he applied the circumſtances of this caſe to that principle, and concurring with Mr. juſtice *Aſhurſt*, the order of ſeſſions was confirmed.

DAVID, *v.* DINWOODY, *Eaſter*, 32 *Geo.* 3. *B. R.* ſeems completely to ſettle and conclude this queſtion of competency.

This was an action by the executrix of a ſurviving truſtee, under a marriage ſettlement of *J. Lewis*, in 1780, by which certain houſhold goods, mentioned in a ſchedule annexed to the deed, were ſettled to the ſole and ſeparate uſe of *Lewis*'s wife; and it was brought againſt the defendant, ſheriff of *Monmouthſhire*, to recover back the value of ſome of thoſe articles which had been ſeized and ſold by him, under an execution againſt *Lewis*.

At

At the trial, *J. Lewis* was called as a witneſs, to prove the identity of the goods: the defendant's counſel objected to his competency, and it was ſaid that he was intereſted; to which it was anſwered, that he came to ſpeak againſt his intereſt, for that if theſe goods, which had been ſeized, were not his own, and could not be taken to pay *his* debt, he would be liable afterwards. Whereas, if they could be taken in execution, his debt would be diſcharged.

Grose, juſtice, admitted the witneſs, but reſerved the point.

Adair, ſerjeant, having obtained a rule to ſhew cauſe why the verdict for the plaintiff ſhould not be ſet aſide, and a new trial had,—

Bower and *Lane* ſhewed cauſe againſt it, arguing that the huſband was a competent witneſs in this cauſe, becauſe he was not intereſted. The rule with regard to admitting huſbands and wives as witneſſes, is accurately laid down in the law of *Niſi Prius*, where it is ſaid, that huſband and wife cannot be admitted as witneſſes *for* each other, becauſe their *intereſts* are abſolutely the ſame; nor *againſt* each other, becauſe *contrary* to the *legal policy of marriage*. *Bull. N. P.* 286.

This rule is warranted by the caſes. *Broughton*, v. *Harpur*, 2 lord *Raym.* 752. *Bentley*, v. *Cook*, cited in the *King*, v. *Cliviger*, 2 *Term. Rep.* 265. *Ante* . went on the ground of *intereſt*; and 1 *Brownl.* 47. and the *King*, v. *Cliviger*, 2 *Term. Rep.* 263. *Ante* . on *the policy of marriage*.

Then the only ground on which huſbands and wives are rejected, when ſpeaking *for* each other is intereſt, but here the intereſt was the other way. And if the ground of intereſt be laid out of the caſe, it was not againſt the policy of marriage to admit this huſband; for this was an action againſt the ſheriff, in which the wife's intereſt does not appear at firſt to be affected; and if the court take notice of the ſituation in which the huſband ſtood, they muſt ſee that the intereſt of the wife was ſole and ſeparate from that of her huſband. In *Williams*, v. *Johnſon*, to an action againſt the daughter's huſband for wedding clothes, the defence was, that the

goods were furniſhed on the credit of the father; to prove which the mother, who was preſent when the goods were bought, was called to charge her huſband, and allowed. 1 *Stra.* 504.

Lord KENYON, chief juſtice, (ſtopping *Adair* and *Caldecott, contra,)* independently of the queſtion of intereſt, huſbands and wives are not admitted as witneſſes, either for or againſt each other; from their being ſo nearly connected, they are ſuppoſed to have ſuch a bias upon their minds, that they are not permitted to give evidence either for or againſt each other.

BULLER, juſtice. It is now conſidered a ſettled principle of law, that huſbands and wives cannot in any caſe be admitted as witneſſes, either for or againſt each other. *Rule abſolute.*

Rule the Fifth.

But though a wife, in civil or in criminal caſes, cannot be received as a competent witneſs againſt her huſband, yet in a criminal caſe, where *ſhe* is the *party grieved*, and on whoſe perſon the crime is committed, ſhe is a competent witneſs againſt her huſband; and of courſe her examinations may be received againſt him; and this rule is grounded on evident neceſſity. *Vide Rule* 2. *Ante*

As in the KING, *v.* MERVIN, lord AUDLEY, earl of CASTLEHAVEN, before the LORDS, *April* 16, 7 *Car.* 1.

There were three indictments found at Saliſbury, in WILTSHIRE, againſt the earl, before HYDE, C. J. *B. R.* RICHARDSON, C. J. C. P. and DERHAM, B. juſtices of aſſize for that circuit, and ſpecial commiſſioners in that matter. *Ruſhw. Coll. vol.* 2, *p.* 93—101. *Hutt.* 115.

One indictment was for a rape upon his own wife, the counteſs of *Caſtlehaven*, by holding her by force, while one of his minions forcibly, and againſt her will, had carnal knowledge of her: ſo that he was indicted as *preſens auxilians* and *confortans*; and therefore a principal. The other two indictments were for buggery with *Laurence Fitzpatrick*, his lordſhip's footman.

Previous

Previous to the trial, ſeveral queſtions were propoſed to the JUDGES, by ſir *Robert Heath*, attorney-general, among which was—"Whether the wife in this caſe, "might be a witneſs againſt her huſband for the rape?" And the JUDGES anſwered, "She might: for ſhe was "the party wronged; otherwiſe ſhe might be abuſed. "In like manner a villein (vaſſal) might be a witneſs "againſt his lord in ſuch caſes." 1 *State Tri. Harg.* 387.

Lord AUDLEY, in his defence on trial, deſired "to "be reſolved, whether his wife is to be allowed to be a "competent witneſs againſt him, or not?" And the judges, eight being preſent, reſolve, "That in civil caſes "the wife may not; but in a criminal caſe of this na- "ture, where the wife is the party grieved, and on "whom the crime is committed, ſhe is to be admitted a "witneſs againſt her huſband." The counteſs was accordingly ſworn, proved the perpetration of the rape, by the aſſiſtance of her lord, and he was convicted and hanged.

HALE appears to conſider this caſe as law, and cites it as a precedent. 1 *Hale Pl. Cr.* 301. *Hutt.* 116. In *Mary Griggs* caſe, the caſe of lord *Audley* is denied to be law. *T. Raym.* 1. *Ante*

Baron GILBERT ſays, in the caſe of lord AUDLEY, where the huſband was charged to have aſſiſted to the rape of his wife, the wife was allowed a witneſs, becauſe it was a perſonal force done to her; and of ſuch ſecret violence, there could be no other proof but by the oath of his wife. But (on the whole) this piece of law hath ſince been exploded, that in a perſonal wrong done to the wife, the wife may be evidence againſt the huſband, becauſe it may be improved to dreadful purpoſes, and muſt be cauſe of implacable enmity, if the huſband chance to be acquitted. *Gilb. Law of Evid. by Loft*, 253. *T. Raym.* 1. 2 *Keb.* 403. *pl.* 8.

LOFT cites a recent caſe in ſupport of this opinion—a caſe ſingular, and at leaſt equally horrible and unnatural as that of the earl of *Caſtlehaven*. At the Summer aſſizes of *Bury*, 1784, the judge recommended in his charge, that a bill then before the grand jury ſhould not be

be found, if unſupported by any other evidence than the wife of the party charged: ſince otherwiſe a cauſe very peculiarly unſuitable to be brought, without effect, before the public ear, would come to trial with a legal neceſſity of the priſoner being diſcharged from the indictment, for want of evidence *competent* to go to the jury. *Ibid.*

In this direction there was a chaſte and a moral policy—it was an unheard of crime. Among the ancient Romans, there was no puniſhment for parricide; the offence being conſidered as an impoſſibility, and the Engliſh judge was right in ſuppreſſing the promulgation of an offence, which moſt probably will never again ſhock the feelings of humanity.

BLACKSTONE ſupports the opinion of the judges in lord *Caſtlehaven*'s caſe. After laying down the incompetency of huſband and wife in civil and criminal caſes, he ſays, "but where the offence is directly againſt the perſon of the wife, this rule has been uſually diſpenſed "with." And he cites lord *Caſtlehaven*'s caſe. 1 *Com.* 443.

So in the KING, *v.* AZIR. *Niſi Prius. Trinity*, 11 *Geo.* 1. On an indictment againſt the huſband for an aſſault upon his wife, lord RAYMOND, chief juſtice, allowed her to be a good witneſs for the king: and cited lord *Audley*'s caſe. 1 *Stra.* 633.

And in the KING, *v.* Doctor MARRIOTTE. GEORGE, recorder of Dublin, (now baron) allowed the wife to give evidence of an aſſault and battery, committed on her when alone in her chamber, by her huſband. 1792.

Rule the Sixth.

In murder, the dying declarations of huſband or wife if in *extremis*, and conſcious of approaching diſſolution, may be received in evidence: and after a mortal wound is given, the dying declaration is evidence, although the party did not expreſs any apprehenſion of immediate death; if the jury be of opinion, from the circumſtances of the caſe, that the deceaſed muſt have felt ſuch

an

an apprehenſion. *Woodcock's caſe*, *Leach Cr. Ca.* 3 *Edit.* 563. *Dingler's caſe*, 638. *Poſt*

Rule the Seventh.

It appears alſo to be a legal rule, that the examination of a party murdered, whether huſband or wife, taken judicially by a magiſtrate, purſuant to the *ſtatutes of Philip and Mary*, may be read in evidence againſt *huſband* or *wife*. And if not taken judicially—*Query*, may it not be read as a dying declaration? Vide *the caſes cited to the preceding rule.*

Rule the Eighth.

The affidavit of the wife is permitted to be read as evidence, on an application to the court of king's bench for an information againſt the huſband to take her away by force after articles of ſeparation, and ſhe is afterwards a competent witneſs againſt him on the trial; for it would be ſtrange to permit her to be a witneſs to ground a proſecution upon, and not afterwards to be a witneſs on the trial. *Bull. N. P.* 287. *Lady Lawley's caſe.*

And in the KING, (at the proſecution of lady STRATHMORE) *v.* ANDREW ROBINSON BOWES. *Eaſter*, 27 *Geo.* 3.

Articles of the peace having been exhibited againſt the defendant, by the counteſs of *Strathmore*, his wife, he entered into ſecurity for his good behaviour for a twelvemonth. Soon after the expiration of the time, the defendant, with others, carried off his wife by force and confined her, ſhe was brought up by *habeas corpus*, exhibited freſh articles of the peace againſt her huſband, and he was not only held to bail himſelf in 10,000*l.* and two ſureties of 5000*l.* each, but an information was granted againſt him, on which he was tried, convicted, and puniſhed, by fine and ſevere impriſonment. 1 *Term. Rep.* 698. Vide *Lord Ferrar's caſe.* 1 *Burr.* 635. *Same point.*

Rule the Ninth.

A *wife* may give evidence againſt a priſoner, although ſhe entertain a hope, that the conviction of ſuch priſoner will tend to procure the pardon of her huſband, previouſly convicted of felony; for this influence only affects her *credit*, and not her *competency*.

As in the KING, *v.* MARG. CAROL. RUDD, *Old-Bailey, December ſeſſions*, 1775, before ASTON, J. BURLAND, B. and GLYNN, *ſerjeant* and *recorder*, on an indictment for forgery.

Henrietta Alice Perreau, the wife of *Robert Perreau*, who was then under ſentence of death, for having feloniouſly uttered a bond knowing it to be forged, was produced as a witneſs for the crown.

She was ſworn on the *voire dire*.

Davy, ſerjeant, of counſel for the priſoner, aſked her "Whether ſhe did not apprehend that Mrs. *Rudd*'s con-"viction would contribute to procure her huſband's "pardon?" to which ſhe anſwered, "If Mrs. *Rudd* is "found guilty, I ſuppoſe it will. I hope it may be the "means of procuring Mr. *Perreau*'s pardon."

Davy ſubmitted to the court, that Mrs. *Perreau* was not a competent witneſs, after having told the court ſhe *hoped* the conviction of the priſoner might be the means of obtaining her huſband's pardon. No perſon can be a witneſs in any civil action or criminal proſecution, who is intereſted in the event of the ſuit. A perſon whoſe bond or note is forged ſhall not be admitted to prove it a forged inſtrument, if in conſequence of his teſtimony, the validity of the inſtruments may be any way affected by the conviction of the defendant. If *Robert Perreau* was a co-defendant with Mrs. *Rudd*, Mrs. *Perreau* could not be admitted to give teſtimony: for the wife is not competent to give evidence for her huſband or the co-defendant of her huſband. Vide *Rule* 4. *Ante*

Cowper, (*Thomas*) ſame ſide. The law requires that every witneſs ſhall be totally indifferent as to the event of the cauſe. When a witneſs *conceives* himſelf intereſted in the event of a proſecution, though miſtaken, his mere *imagination* of being intereſted, is as ſtrong an objection

objection to his competency as if he had been really interested therein. For the wisdom of the law anxiously endeavours to exclude every witness who has the least bias on his mind, from whatsoever source that bias may spring; and to render a witness superior to all objection, he must be totally indifferent upon the subject on which he is about to be examined, and altogether disinterested in the event of the prosecution. The bias on the mind of a wife in favour of her husband, or a husband in favour of a wife, is the strongest the law takes notice of; and for Mrs. *Perreau* not to be impressed by that bias; not to be warped by the ties of conjugal affection; not to come with more solicitude and anxious wishes for her husband, than for the prisoner, would be almost criminal apathy. Whether her conception or hope, that the conviction of Mrs. *Rudd* will contribute to her husband's pardon, be well or ill founded, will not alter the case an iota: she has declared it is her opinion, that her husband's innocence will appear in consequence of Mrs. *Rudd*'s conviction, and that she hopes his pardon will be the consequence: It is then through the medium of Mrs. *Perreau*'s testimony, which is to contribute to the conviction of Mrs. *Rudd*, that her husband's life is to be saved—and if that is not a clear, a decisive, and a positive interest, it is impossible to define what a positive interest is. If upon the trial, when it was an equal chance whether he would or would not be under sentence of death, his wife could not be a witness for him, is he, when under sentence of death, to be rescued from that unfortunate situation by her testimony? does the influence cease and become an objection to her *credit* only? and not to her *competency*? In civil cases, if an objection be taken to a witness, who only imagines he has an interest, though he really has none, such objection is invariably allowed to prevail. If a master, in defending his servant, imagines that, in point of honour, he ought to pay his costs, his testimony is rejected. Mr. *Cowper* cited another case, and concluded in the words of lord MANSFIELD, "It is not the office of courts of law to "consider how far the minds of men may be capable of "resisting temptation, but to take the most anxious

" care that they ſhall not be expoſed to any temptation " at all."

Lucas, for the crown, ſaid, the argument uſed went to ſhew the degree of *credit*, rather than to deſtroy the *competency* of the witneſs. If the doctrine of incompetency prevailed to the extent contended for, it would be impoſſible to convict on any crime, or any certainty of guilt. It would render incompetent every perſon robbed expecting a reſtoration of property; every proſecutor intitled to a reward depending on conviction; but no objection can be made on that ground. An accomplice not ſure of his pardon, yet hope it he muſt, and yet ſuch accomplice is a competent witneſs. The intereſt of a witneſs to raiſe incompetency, muſt be a direct and immediate intereſt; and that intereſt muſt exiſt and appear clearly before the competency of a witneſs can be deſtroyed.

COURT: The reaſon aſſigned by Mrs. *Perreau* for her hope, that the conviction of the priſoner might tend to procure her huſband's pardon, appears to be ſubſtantially founded on an idea that ſuch facts may appear in evidence on the trial, as will ſhew that her huſband is innocent, and induce the crown to extend its mercy to him. She apprehends that Mrs. *Rudd*'s guilt will be manifeſted: but it does not follow, that if the jury ſhould be of opinion that Mrs. *Rudd* is guilty of the preſent charge, *Robert Perreau* muſt be innocent of the charge of which he has been convicted; or that her conviction will ſo ſoften the complexion of his guilt, as neceſſarily to induce the crown to pardon him; and therefore the hope ſhe has expreſſed, is not ſufficient to render her an incompetent witneſs; for the bond, for the uttering of which *Robert Perreau* was convicted, is not the ſame bond for the forging of which Mrs. *Rudd* is to be now tried.

The obſervation, that if *Robert Perreau* were a co-defendant with the priſoner, Mrs. *Perreau*'s evidence would be inadmiſſible, is well-founded, for a wife cannot *directly*, nor *indirectly*, give evidence either for or againſt her huſband; but it does not apply to the preſent caſe. Vide *Ante*

The

The caſes put by Mr. *Lucas* are appoſite to the preſent caſe. The accomplice hopes for mercy, yet notwithſtanding his diſcloſure, he may be indicted and convicted. In proſecutions where there are rewards, a witneſs expecting the reward, on conviction, may be conſidered intereſted in the event of the cauſe, yet he is competent. So are criminals, admitted under the ſtatutes of king *William* and queen *Anne*, becauſe they are not intitled, unleſs they convict. It would be againſt the rules and principles of law, if ſuch perſons by giving their teſtimony, were conſidered as intereſted in the event of the proſecution. They are in the ſame ſituation, in appearance, who, although they do not convict, are intitled to a pardon. But the caſe of a proſecutor, declaring that he hoped by the conviction of a priſoner to obtain reſtitution of his property, is preciſely parallel to, and deciſive of the preſent point. Whatever therefore Mrs. *Perreau*'s hopes may be, yet as the ſatisfying of them does not neceſſarily follow upon the conviction of Mrs. *Rudd*, the court is of opinion, that ſhe cannot be conſidered as *intereſted* in the event of the proſecution, ſo as to exclude her from giving her teſtimony therein; for that although the objection goes very ſtrongly to affect her *credit*, of which the priſoner will have all the advantage, it leaves her *competency* undeſtroyed.

Mrs. *Perreau* was examined—Mrs. *Rudd* was acquitted; the jury bringing in their verdict "according to the "evidence before us—*Not Guilty.*" *Leach Cr. Ca.* 2 *Edit.* 110. 3 *Edit.* 133.

Rule the Tenth.

But though a wife *de jure* cannot be a witneſs for or againſt her huſband, yet a wife *de facto* may.

As if a woman be taken away by force and married, ſhe may be a witneſs againſt her huſband, indicted on the ſtatute againſt the ſtealing of women, for a contract obtained by force, hath no obligation in law. *Ex vi injuſta non oritur contractus. Gilb. La. Evid. by Loft*, 254. 2 *Hawk. P. Cr. Ca.* Vide *Stat.* 3 *Hen.* 7. *ca.* 2. *Anno* 1486.

BLACKSTONE aſſigns another reaſon for this rule. In this caſe he ſays, the woman can with no propriety be reckoned his wife, becauſe a main ingredient, *her conſent* was wanting to the contract: and alſo there is another maxim of law, that no man ſhall take advantage of his own wrong, which the raviſher here would do, if by forcibly marrying a woman, he could prevent her from being a witneſs, who is perhaps the only witneſs to that very fact. 1 *Comm.* 444.

As in the KING, *v.* lady FULWOOD, *and others*, *Mich.* 13 *Car.* 1. *B. R.* indicted on ſtat. 3 *Henry*, *ca.* 2. SARAH COXE, the heireſs, who was carried away, gave evidence againſt *Roger Fulwood*, who had married her by *dureſs*, which the court conſtrued to amount to force, and the defendant was found guilty. *Cro. Car.* 482, 488, 489.

So in the KING, *v.* BROWN, *Trinity*, 25 *Car.* 2. the ſame point was reſolved by all the judges of the king's bench, for theſe reaſons.

Firſt, becauſe otherwiſe the ſtatute would be vain and uſeleſs, for poſſibly all that were preſent were of the offender's confederacy. *Secondly*, the marriage, though a marriage *de facto*, yet, if it were effected by a continued act of force, was not a marriage *de jure*, for it was diſſolvable by divorce, unleſs ratified by a ſubſequent free cohabitation. *Thirdly*, and principally becauſe it was *flagrante crimine*; for the child was taken away upon the *Thurſday*, married the *Friday*, and ſeized by the guardian the next day, before they had lain together, and the force was all that while continuing upon her. *Fourthly*, there were other witneſſes, that proved the firſt taking away by force againſt the child's will, though there were no witneſſes to prove the marriage forcibly but *herſelf*, who expreſsly ſwore that ſhe was married againſt her will; upon all which circumſtances it was ruled, that ſhe ſhould be examined in evidence, and the credibility of her teſtimony left to the jury. But, moſt were of opinion, that had ſhe lived with him any conſiderable time, and aſſented to the marriage by a free cohabitation, ſhe ſhould not have been admitted as a witneſs againſt her huſband. The priſoner was convicted, had judgment of death, and was executed. 1 *Hale P.*

301,

C. 301, 302. 1 *Vent.* 243. 3 *Keb.* 193. 5 *St. Tr.* (*Harg.*) 6, 8.

But in the case of PERRY, on an indictment for a forcible marriage, the wife was admitted a witness for her husband, to prove that the elopement and marriage were voluntary and not forced. *Bristol assizes*, 1794.

Rule the Eleventh.

In the case of high treason the wife is admitted as evidence against her husband, because this is for the public safety, which is to be preferred before the interest or peace of private families; and the ties of allegiance are more obligatory than any relation whatever. *Gilb. La. of Evid. by Loft*, 252.

Cari sunt parentes, cari liberi, propinqui familiares; omnes omnium caritatutes patria una complexa est: pro qua quis bonus dubitet mortem oppetere si ei sit profuturus? De office. Ed. Davis, 17.

But the wife is not bound to discover her husband's treason, though the son is. *Brownl.* 47.

In the case of MARY GRIGGS, the above rule is laid down. *T. Raym.* 1. *Ante*

So in ANNESLEY, *v.* the earl of ANGLESEY. *Exchq. Ireland*, 17 *Geo.* 2. It is said, the only instance wherein a wife can be examined against her husband is in high treason. 11 *St. Tr.* 402. *in note.*

NOTE. In the researches I have made I have not discovered any trial for treason, where the wife was examined as a witness against her husband, on a charge of high treason. M. See *Omichund, v. Barker. Ante*

Rule the Twelfth.

All relations, except husband and wife, as parents, children, &c. are competent to give evidence against each other. *Co. Litt.* 6.

And dreadful as the idea is, yet even in capital cases, a parent may be called on to give evidence against a child, a child against a parent, or children of the same parents against each other!

PENCHELE,

PENCHELE, *v.* PENDRELL, *Hilary*, 5 *Geo.* 2. before lord RAYMOND. This was an iſſue out of chancery, to try whether the plaintiff was heir to *T. O.* The marriage and birth being admitted, by order, the mother was called on to prove that her huſband had acceſs to her. 2 *Stra.* 925. 3 *P. Wills.* 276.

So in LOMAX, *v.* LOMAX, before lord HARDWICKE, the mother, as a witneſs for her child, was admitted to prove her marriage. *Bull. N. P.* 287.

And in an ejectment againſt *Sarah Brodie*, at *Hereford*, WRIGHT, J. admitted the father to prove the daughter legitimate, her title being as heir to her mother. *Ibid.*

So in the KING, *v.* the MAYOR and BURGESSES of *Oakhampton*, *Trinity*, 25 *and* 26 *Geo.* 2. 1752. Mandamus to admit *J. Stotus* to his freedom, as being the eldeſt ſon of a freeman. The queſtion was, whether the father was an *admiſſible* witneſs to prove a cuſtom in the corporation in favour of his ſon.

LEE, C. J. The perſon to whom the remainder of an eſtate is, after the determination of a particular eſtate, limitted by will, cannot be admitted to prove the will, becauſe he has, although it be remote, a veſted intereſt in the matter in queſtion. But it hath been always holden, that the ſon of the perſon to whom the particular eſtate is deviſed by will, may be permitted to prove the will, becauſe although he may be under a bias, he has not a veſted intereſt in the queſtion.

Mere relationſhip, how near ſoever the relation may be, does not go to the *competency* of a witneſs, unleſs there be a *veſted intereſt* in the matter in queſtion. The bias which the father is preſumed to be under, in giving teſtimony in favour of his ſon, does certainly go to his *credit*; but a father is in *all* caſes a *competent* witneſs for his ſon, if he have not a veſted intereſt in queſtion. 1 *Wilſ.* 332. *Sayer* 45. *S. C.*

NOTE. Among the many crown proſecutions produced by the rebellion in Ireland, 1798, there was not an inſtance where any near relation was called upon as a witneſs, to give evidence on the part of the proſecution; but on the part of the priſoners, relatives in every degree, father, mother, brother, ſiſters, &c. were produced

duced by the priſoners, and examined without objection to their competency.

CHAPTER XVII.

Of the admiſſion of Approvers as witneſſes for the crown; and of Accomplices, and the credit due to their evidence, when examined on trial.

TO underſtand the rules of evidence which apply to *accomplices*, it is neceſſary firſt to be acquainted with the antient law reſpecting *approvers*.

APPROVER, or PROVER, *approbatur*, is one that confeſſing felony committed by himſelf, appealeth, or accuſeth others to be guilty of the ſame crime. He is called approver in this ſenſe, becauſe he muſt *prove* what he hath alledged; and that proof was antiently by battle, or the country, at the election of him appealed or accuſed, who is called the *appellée*. The form of the accuſation is in *Cromp. Juſt.* 250. Vide alſo, *Bract. lib.* 3. *Staunf. Pl. Cr.* 52.

A *particeps criminis* cannot be admitted as an approver until he is indicted. If a perſon indicted for treaſon or felony, not diſabled to accuſe, upon his arraignment, before any plea pleaded, and before competent judges, confeſſeth the indictment and takes an oath to reveal all treaſons and felonies that he knoweth of, and therefore prays a coroner to enter his appeal or accuſation againſt thoſe that are partners in the indictment, ſuch a one is an approver. 3 *Inſt.* 129. 1 *Hale Pl. Cr.* 192.

This *law* of approvement being ſtill in force, and the *uſage* of admitting accomplices being analogous to it; does it not appear that an accomplice, after indictment found, and before plea pleaded, may be admitted a witneſs on the part of the crown? Hale touches on the ſubject, the party, he ſays, that is the witneſs, is never indicted, becauſe that doth much weaken his teſtimony, but poſſibly not wholly take away his teſtimony. 1 *Hale Pl. Cr.* 305.

Sir

Sir WILLIAM BLACKSTONE conſiders approvement a ſpecies of *confeſſion*, and that ſuch approvement can only be in capital offences; and it is, as it were, equivalent to an indictment, ſince the appellee is equally called upon to anſwer it: and if he hath no reaſonable and legal exceptions to the perſon of the approver, which indeed are very numerous, he muſt put himſelf upon his trial, either by battle, or by the country, and, if vanquiſhed or found guilty, muſt ſuffer the judgment of the law, and the approver ſhall have his pardon *ex debito juſtitiæ*. On the other hand, if the appellee be conqueror, or acquitted by the jury, the approver ſhall receive judgment to be hanged, upon his own confeſſion of the indictment; for the condition of his pardon hath failed, *viz.* the convicting of ſome other perſon, and therefore his confeſſion remains abſolute.

But it is clearly in the diſcretion of the court to permit the approver thus to appeal or not; and in fact, this courſe of admitting approvements hath been long diſuſed: for the truth was, as ſir *Matthew Hale* obſerves, that more miſchief hath ariſen to good men by theſe kind of approvements, upon falſe and malicious accuſations of deſperate villains, than benefit to the public, by the diſcovery and conviction of real offenders. And therefore in the times when ſuch appeals were more frequently admitted, great ſtrictneſs and nicety were held therein, though ſince their diſcontinuance, the doctrine of approvements appears of more curioſity than uſe. 4 *Comm.* 324, 325. 2 *Hale, P. C. ca.* 29. 2 *Hawk. P. C. ca.* 24.

The commentator adds, that all the good, whatever it be, that can be expected from this method of approvement, is fully provided for in the caſe of robbery, burglary, houſe-breaking, and larceny, to the value of five ſhillings, from ſhops, ware-houſes, ſtables, and coach-houſes; which ſtatutes enact, that if any ſuch felon, being out of priſon, ſhall diſcover two or more perſons, who have committed the like felonies, ſo as they may be convicted thereof, he ſhall, in moſt caſes, receive a reward of forty pounds; and, in general, be intitled to a pardon of all capital offences, excepting only murder

and

and treaſon. *Stat.* 4 & 5 *Will.* & *Mary*, *ca.* 8. 10 & 11 *Will.* 3. *ca.* 23. 5 *Anne ca.* 21.

And if any ſuch perſon having ſtolen any lead, iron, or other metals, ſhall diſcover and convict two offenders of having illegally bought or received the ſame, he ſhall be pardoned of all *ſuch* felonies committed before ſuch diſcovery. 29 *Geo.* 2. *ca.* 30.

A proviſion by parliament, ſo early as the reign of king *Edward* the third, ſhews in ſome degree, that even then, men confeſſing themſelves guilty of crimes were conſidered of little credit; for it is enacted, that if any *gaoler*, by too great dureſs of impriſonment, makes any priſoner that he hath in ward, become an approver, or an appellor againſt his will, to accuſe and turn evidence againſt ſome other perſon, it is *felony* in the gaoler. *Stat.* 14 *Edw.* 3. *ca.*

For, ſays ſir *Edward Coke*, it is not lawful to induce or excite any man, even to a juſt accuſation of another, much leſs to do it by dureſs of impriſonment, and leaſt of all by a gaoler, to whom the priſoner is committed for ſafe cuſtody. 3 *Inſt.* 91. 4 *Black. Comm.* 129.

In the KING, *v.* MARGARET CAROLINE RUDD, *Trinity*, 13 *Geo.* 3. the court of king's bench took a retroſpect to the law of approvement, and examined and determined upon the privileges of *accomplices*, making diſcoveries.

Mrs. *Rudd* had ſworn informations before a magiſtrate, in which ſhe confeſſed that ſhe had ſigned a bond of 7,500*l.* but under threats of death from *Robert* and *Daniel Perreau* if ſhe refuſed, and the magiſtrate conceiving this to be a confeſſion of her own guilt, admitted her as a general witneſs for the crown, in the character of an *accomplice*; telling her if ſhe would ſpeak the truth, and the whole truth, not only in reſpect to the bond in queſtion, but of all other forgeries, then ſhe ſhould be ſafe.

She denied having knowledge of, or concern in any other bonds; and the *Perreau*'s were tried and convicted, Mrs. *Rudd* appearing and giving evidence againſt them: but it appearing on the trial of *Robert Perreau*, that ſhe had confeſſed to Mr. *Drummond*, a banker, that ſhe was guilty of forging another bond, and that *Robert* was

innocent of that fact; ſhe was committed to Newgate on warrant of the juſtices of gaol delivery, to anſwer ſuch matters as ſhould be objected againſt her, touching the laſt felony and forgery. A detainer was afterwards lodged upon her on the oath of ſir *Thomas Frankland*.

Under theſe circumſtances, ſhe obtained a *habeas corpus* to the court of king's bench, with a view to be admitted to bail, and the above commitments were returned to the court.

Wallace, *Lucas*, and *Howarth*, ſhewed cauſe againſt admitting her to bail, on two points: *Firſt*, that juſtices of the peace have no power to admit an accomplice in forgery a witneſs for the crown, forgery not being one of the offences mentioned in the ſtatutes of king *William* the third and queen *Anne*. Vide *the ſtatutes. Ante*

Secondly, that ſuppoſing forgery were an offence within thoſe ſtatutes, yet the confeſſion of the defendant had gone no further than one bond, and was ſilent as to two others, and as ſhe had not complied with the condition which the ſtatute impoſes, of making a full diſcloſure and diſcovery of all ſhe knew, ſhe was not intitled to any favour or protection in reſpect of the other two bonds.

Davenport, for the defendant, contended, that as ſhe had been admitted an evidence for the crown by the juſtices of the peace, and had under the faith and confidence of that admiſſion, made a diſcloſure of the facts ſhe was acquainted with, it would be a breach of public faith to deprive her of the benefit ſhe was thereby led to expect.

Lord MANSFIELD, in ſtating the opinion of the court on the above point, ſaid—A third ground which has been urged in ſupport of the preſent application is this, that the priſoner has been drawn in by promiſes and aſſurances to anſwer to an examination, and to ſwear to it on oath, which ſhe would not have done, but from a confidence that thoſe promiſes and aſſurances would have been kept and performed.

The inſtance has frequently happened, of perſons having made confeſſions under threats or promiſes: the conſequence as frequently has been, that ſuch examination

tion and confeſſions have not been made uſe of againſt them on their trial. But it has been urged, that the priſoner in this caſe is an *accomplice* who has been *admitted* to give *evidence*, and that ſhe has already given evidence, and is further ready to give evidence to convict her partners in this buſineſs; and that ſhe is therefore intitled by law, to the king's pardon, and to a pardon which would operate in bar to her own crime. If ſhe had ſuch a right, we ſhould be bound *ex debito juſtitiæ* to bail her. If ſhe had not ſuch legal right, but yet came under circumſtances ſufficient to warrant the court in ſaying, that ſhe had a title of recommendation to the king for a pardon, we ſhould bail her for the purpoſe of giving her an opportunity of applying for ſuch pardon.

There are *three* ways in law and practice which give accomplices a right to a pardon; and there is *one* mode which intitles them to a recommendation to the king's mercy.

The three legal ways are, *firſt*, in the caſe of *approvement*, which ſtill remains part of the common law, though by long diſcontinuance the practice of admitting perſons to be approvers, is now grown into diſuſe; *ſecondly*, the caſe of perſons who come within the ſtatutes of king *William* and queen *Anne*; and *thirdly*, the caſe of perſons to whom the king has, by ſpecial proclamation in the *Gazette*, or otherwiſe, promiſed his pardon. Vide *Blackſ. above cited.*

Approvers have a right to a pardon; perſons within the ſtatutes of king *William* and queen *Anne* have a right to a pardon, and in all thoſe caſes the court will bail them, in order to give them an opportunity of applying for a pardon.

There is beſide a *practice* which indeed does not give a legal right; that is where accomplices having made a full and fair confeſſion of the whole truth, one in conſequence thereof admitted evidence for the crown, and that evidence is afterwards made uſe of to convict the other offenders. If in that caſe they act fairly and openly, and diſcover the whole truth, though they are not intitled *of right* to a pardon, yet the *uſage*, the lenity, and the practice of the court is, to ſtop the proſecution

againſt them, and they have an equitable title to a recommendation to the king's mercy.

The ſtatutes of *William* and *Anne* are to be laid out of the caſe: *firſt*, becauſe they are confined to the diſcovery of particular offences only, of which *forgery* is not one: *ſecondly*, becauſe they relate only to perſons who are not at large; beſides which, to intitle themſelves to a pardon, they muſt actually *convict* two offenders at leaſt; for if their confeſſion be ſuch on their trial as to give no credit to, they are liable to proſecution. Promiſes of pardon from the crown, by proclamation, are alſo foreign to the preſent caſe.

There remains only therefore the equitable practice which gives a title to recommendation to the mercy of the crown.

The *law* of *approvement* (in analogy, to which this other practice has been adopted) and ſo modelled as to be received with more latitude, is ſtill in force, and very material.

A perſon deſiring to be an approver, muſt be one *indicted* of the offence, and in *cuſtody* on that indictment: he muſt confeſs himſelf *guilty* of the offence, and *deſire* to accuſe his accomplices: he muſt likewiſe upon oath diſcover, not only the particular offence for which he is indicted, but *all treaſons* and *felonies* which he knows of; and after all this it is in the diſcretion of the court, whether they will aſſign him a coroner, and admit him to be an approver or not; for if on this confeſſion it appears, that he is a *principal*, and tempted the others, the court may refuſe and reject him as an approver. 2 *Haw. P. C. ca. Fitzh. Cor.* 50, 251, 441.

When he is admitted as ſuch, it muſt appear that what he has diſcovered is true, and that he has diſcovered the *whole truth*. 10 *Co.* 76.

For this purpoſe the coroner puts his appeal into form, and when the priſoner returns into court, he muſt repeat his appeal, without any help from the court, or from any bye-ſtander. And the law is ſo nice, that if he *vary* in a *ſingle circumſtance*, the whole falls to the ground, and he is condemned to be hanged: if he *fail* in the *colour* of a *horſe*, or in circumſtances of time, ſo rigorous

is the law, that he is condemned to be hanged; much more if he fail in eſſentials. The ſame conſequences follow, if he do not diſcover the *whole truth:* and in all thoſe caſes the approver is convicted on his own confeſſion. 2 *Hale P. C.* 226, *to* 236. *Staunf. P. C. lib.* 2. *ca.* 52. *to ca.* 58. 2 *Hawk. Pl. Cr. ca.* 24. 3 *Inſt.* 129.

A further rigorous circumſtance is, that it is neceſſary to the approver's own ſafety, that the jury ſhould believe him, for if the partners in his crime are not convicted, the approver himſelf is executed.

Great inconvenience aroſe out of this practice of approvement. No doubt, if it was not abſolutely neceſſary for the execution of the law againſt notorious offenders, that accomplices ſhould be received as witneſſes, the practice is liable to many objections; and though under this practice they are clearly *competent* witneſſes, their ſingle teſtimony alone is ſeldom of ſufficient weight with a jury to convict the offender, it being ſo ſtrong a temptation to a man to commit perjury, if by accuſing another he can eſcape himſelf.

Let us ſee what has come in the room of this practice of approvement; a *kind of hope*, that accomplices, who behave fairly, and diſcloſe the whole truth, and bring others to juſtice, ſhould themſelves eſcape puniſhment and be pardoned. This is in the nature of a recommendation of mercy. But no authority is given to a juſtice of the peace to pardon an offender, and to tell him he ſhall be a witneſs againſt others. The accomplice is not aſſured of his pardon, but gives his evidence in *vinculis*, in cuſtody: and it depends on the title he has from his behaviour, whether he ſhall be pardoned or executed. A juſtice has no authority to ſelect whom he pleaſes, to pardon or proſecute, and the proſecutor himſelf has even a leſs power, or rather pretence to ſelect, than even the juſtice of peace.

It reſts therefore on *uſage*, and on the offender's own good behaviour, whether he ſhall be proſecuted or not. And if in a proper caſe, an application was to be made to this court, by an accomplice to be bailed, that is of a perſon properly within the uſage, and who has fully complied with the requiſite conditions; I ſhould have

no

no difficulty in bailing him, in order that he might apply for the king's pardon.

Theſe he conſidered the general rules, but the priſoner not having made a full and fair diſcloſure, which would have intitled her to a recommendation to mercy, ſhe was remanded. *Leach. Cr. Ca.* 3 *Edit.* 133 *to* 145.

At the *Old-Bailey*, *September ſeſſions*, 1775, Mrs. *Rudd* was put on her trial, on an indictment for forgery, before GOULD and ASHURST, J's. and HOTHAM, B. when the ſame points was made and argued, and the court differing in opinion, ſhe was remanded until the queſtion ſhould be determined by the twelve judges.

In *December ſeſſions* ſhe was again put to the bar, when ASTON, J. informed her, it was the opinion of nine of the judges that ſhe ought to be tried, and ſhe was tried and acquitted. *Vide*, the reaſons at large. *Leach Cr. Ca.* 147.

From the above deciſion, and the reaſon on which it is grounded, reſult the following rules;

Rule the Firſt.

An *approver*, though he has confeſſed himſelf a felon, and of courſe infamous, and though liable to be hanged for the crime he confeſſes if he fails to convict the appellee, but certain of a pardon if he ſucceeds, is notwithſtanding a *competent* witneſs.

Rule the Second.

The *confeſſion* of an *accomplice* in *treaſon* or *felony*, that he has been guilty of the crime charged upon the priſoner, by acting as an *accomplice* with him, is no objection to his competency as a witneſs, if he has not been indicted, but goes merely to his credit. 2 *Hawk. P. C. ca.* 46.

As in the caſe of THOMAS HOWARD, duke of NORFOLK, for *high treaſon*, before the LORDS, 14 *Eliz.* 1571. His grace objected to one *Barker*, whom he aſſerted had confeſſed himſelf a traitor from fear; and added, that witneſſes muſt be freemen, not traitors, neither outlawed

lawed nor attainted. But *Barker* was examined, though confeſſing himſelf an accomplice, he not having been outlawed, attainted or indicted. 1 *St. Tr.* 113. Vide *Ante* . . *S. C.*

In CHRISTOPHER LOVE's caſe for high treaſon, before the *high court of juſtice*, under the commonwealth of England. 3 *Car.* 2. *Anno* 1651.

Mr. LOVE, in his defence, objected to the competency of ſeveral of the witneſſes produced againſt him. He urged an incompetency as to their *quality*. They were not only perſons accuſed of treaſon, and ſo not to be believed, but they had made an open confeſſion of that which was treaſon, by an act of the (then) government, and ſo were not *legales teſtes*. They had done that by open confeſſion which was equivalent to a conviction, and therefore he ſubmitted to the diſcretion of the court whether they were competent witneſſes.

Sir *Thomas Witherington*, ſecond counſel for the commonwealth, anſwered. The exceptions to the witneſſes are, *firſt*, That they were not *probi teſtes & legales*. *Secondly*, That they were *participes criminis*; and that is included in the other. The witneſſes produced againſt him are *legales teſtes*, they are competent and ſufficient. Mr. *Love* did object that they confeſſed themſelves guilty of the ſame crimes, and ſo their confeſſion is upon the matter a conviction, and being convicted of the crimes in which they are witneſſes againſt him, they are not competent to give evidence.

The common law ſays, if a man be accuſed of high treaſon, indicted of high treaſon, and will confeſs the indictment and become an approver, yet he may be a witneſs againſt all thoſe parties guilty of the ſame treaſons with himſelf; he is *participes criminis* with them, and they with him; and yet the man thus becoming an approver, will at common law be a legal good witneſs againſt them. *Poſtea.*

An approver can only approve; that is, when a man is indicted of high treaſon, and other his accomplices with him, and he upon the indictment ſays it is true, and then deſires he may have ſomething aſſigned to him, and then he accuſes ſuch and ſuch perſons of the ſame crimes;

crimes; in this caſe this man, after he hath confeſſed the indictment, and takes his corporal oath to reveal all treaſons he knows in the indictment (for he can accuſe no further) after this is done he ſhall be a witneſs: he is a witneſs againſt thoſe with whom he is *particeps criminis*; and it is of merit and juſtice that he ſhall be *pardoned* his life. That ſhews the reaſon, that even a man after indictment and confeſſion, yet being an *approver*, ſhall be an *accuſer* of thoſe that were *particeps criminis* with him, and a good witneſs. The reaſon of that goes to this caſe, for although theſe men had a hand in the ſame plot and deſign with him (Mr. *Love*) and have confeſſed, and did confeſs it upon evidence, that they were there preſent and did many things, yet they are clear, competent, and good witneſſes, and it is no objection againſt them that they are *participes criminis*. Vide, *Hale P. C.* 303. Mrs. *Rudd*'s caſe, lord MANSFIELD'S *argument*. *Ante*

If the law were otherwiſe, it were impoſſible to prove many offences; for many offences cannot be proved but by ſome men that had a hand in them. In an ordinary caſe of an action of treſpaſs and falſe impriſonment, if three men are guilty of it, it is a uſual thing in courts of juſtice to admit one of them as a witneſs. True, they are not parties in the action, and ſo may be witneſſes: for theſe things may be ſo ſecretly done otherwiſe, that their treaſons could never be revealed to recover againſt the priſoner.

The earl of *Caſtlehaven* was accuſed of a very grievous fact; the witneſſes that came againſt him were his own *menial* ſervants, and were *participes criminis* in the very ſame fact; and theſe men by the opinion of the judges, were competent witneſſes. He was arraigned, indicted, and convicted, and ſuffered death; and one of theſe perſons was afterwards hanged for the ſame offence, which ſhews they were clear and good witneſſes.

It is ſaid they were not *probi teſtes*. They are *probi teſtes, et honeſti* too: for in caſe of an approver, that man that accuſes his brethren upon the ſame treaſon, of merit and juſtice the king ought to grant him his pardon; for they that diſcover the traitors againſt the commonwealth,

are

are certainly *probi teſtes*, and this is no objection againſt them in that, but as before they were *legales teſtes*, ſo they are *probi teſtes*; and good and competent in this caſe.

Mr. *Hale* (afterward ſir *Matthew Hale*) being aſſigned of counſel for the priſoner, obſerved on this point, the caſe that is put concerning an approver comes not to the queſtion; for though it is true an approver at common law might be an accuſer, yet we are not now upon a proceeding of the common law, when we talk of witneſſes now, but we are upon a proceeding how far forth warranted for the witneſſes, by the ſtatute of the 1 and 5 of *Edw.* 6. So that what is ſaid concerning an approver comes not to this queſtion; he that may be a competent witneſs at common law, he is not a competent witneſs upon thoſe ſtatutes, for the words of the ſtatute are expreſsly, "*That he ſhall be a lawful and ſufficient* "*witneſs.*" And if ſo be, that ſuch a caſe were now, it is not to ſample this caſe that is before you with the caſe of an approver, which is a bare accuſation at common law, and where the jury likewiſe are to have other evidence; for either the defendant may wage his battle or put himſelf upon his country; and then it is at the pleaſure of the jury whether they will believe the approver or no: but the act hath made an alteration in the common law; in corroboration of this opinion. 1 *Hale P. C.* 303. & 2 *Hale P. C.* 280.

The objection was over-ruled. 1 *St. Tr.* 113. 2 *St. Tr.* 144, 339, 1099. 3 *St. Tr.* 883. 4 *St. Tr.* 149, 572, 594. 6 *St. Tr.* 259.

NOTE. This caſe, which was before a court eſtabliſhed by uſurpation, is cited, not as deriving authority from its juriſdiction, but in reſpect to the argument in which *Hale* took a part.

So on the trial of the REGICIDES, *Old-Bailey*, *October*, 12 *Car.* 2. 1660, the evidence of accomplices, in the treaſon and murder of king CHARLES I. was received. 2 *St. Tr.* 302. 1 *Hale Pl. Cr.* 304.

In the KING, *v.* TONGE, PHILIPS, and STUBBS, *Newgate ſeſſions*, *December*, 14 *Car.* 2. It was reſolved that ſome of thoſe perſons who are equally culpable with the

reſt, may be made uſe of as witneſſes againſt their fellows, and they are lawful accuſers, or lawful witneſſes within the *ſtat.* 1 *Edw.* 6. *ca.* 12. 5 & 6 *Edw.* 6. *ca.* 11. & 1 *Mary, ca.* 1. and accordingly at the trial of theſe men, ſome other partners in the treaſon were made uſe of againſt the reſt; for lawful witneſſes within thoſe ſtatutes, are ſuch as the law alloweth; and the law alloweth every one to be a witneſs who is not convicted, or made infamous for ſome crime. And if it was not ſo, all treaſons would be ſafe, and it would be impoſſible for one who conſpires with never ſo many others, to make a diſcovery to any purpoſe. *Kelyng* 18.

But HALE, C. B. ſaid, that if one of theſe culpable perſons be promiſed his pardon, on condition to give evidence againſt the reſt, that diſableth him to be a witneſs againſt the others, becauſe he is bribed, by ſaving his life, to be a witneſs, ſo that he takes a difference where the promiſe of pardon is to him for *diſcloſing the treaſon*, and where it is for *giving evidence*. *Ibid.*

But ſome of the other judges did not think that the promiſe of pardon, if he gave evidence, did diſable him, but they all adviſed that no ſuch *promiſe* ſhould be made, or any *threatening* uſed to them in caſe they did not give full evidence. *Ibid.*

The judges who diſſented were, lord HALE and BROWN, J. and *Hale* continued of the ſame opinion, when he wrote his *Pleas of the Crown*, in which he ſays, "If a reward be promiſed to a perſon for giving his "evidence before he gives it, this, if proved, diſables "his teſtimony. And, for my own part, I have always "thought, that if a perſon hath a promiſe of a pardon, "if he gives evidence againſt one of his own confe-"derates, this diſables his teſtimony if it be proved "upon him." 2 *Hales P. C.* 288.

HAWKINS ſupports the reſolution of the judges reported by *Kelyng*, and ſays with them, if no accomplices were to be admitted, it would generally be impoſſible to find evidence to convict the greateſt offenders. 2 *Hawk. P. C. ca.* 46. And,

HALE, in another part of his work, after ſtating the reſolutions in the caſe of *Tonge*, and others, ſays, "But "the

" the jury may, as in other cafes, conſider of the evi-
" dence and *credit* of the witneſs; but he is ſufficient to
" ſatisfy by the ſtatute;" which ſhews that, except where a pardon is previouſly promiſed, the objection goes, not to the *competency* but to the *credit* of the *participes criminis*. 1 *Hale P. C.* 303.

He then ſays, a *participes criminis* is in ſome caſes a lawful accuſer within the ſtatute, in ſome caſes not.

In ſir PERCY CROSBY's caſe, in the *Star-chamber*, it was ruled, that if two defendants be charged for a crime, one ſhall not be examined againſt the other to convict him of an offence, unleſs the party examined confeſs himſelf guilty, and then he ſhall be examined.

And in the KING, *v.* MARY PRICE, *Newgate ſeſſions*, 1672, the defendant was convicted of treaſon, in clipping the current money of England, by the teſtimony of thoſe who were *participes criminis*, who brought her in broad money upon allowance of ten *per cent.* and carried off the clipt money into their maſter's caſh. But it does not appear in this caſe, whether the accomplices were promiſed a pardon or not. 1 *Hale Pl. Cr.* 304.

So in the KING, *v.* HYDE, and others, in the ſame year, for robbery on the highway, the priſoners were convicted by one that was a party in the robbery, but not indicted. 1 *Hale P. C.* 305.

And in the KING, *v.* TREW, *Newgate ſeſſions, December*, 15 *Car.* 2. Defendant was indicted for burglary, and by advice of *Kelyng*, C. J. *Browne*, J. and *Wild*, Recorder, *Perrin*, that was in gaol for two other robberies, and confeſſed himſelf to be in this burglary, was ſworn a witneſs againſt *Trew*, but he was not indicted of the burglaries or robberies. *Ex libro Bridgman.* 1 *Hale P. C.* 303.

From the preceding determinations and which follow, it appears to be ſettled law at this day, that,

Rule the Third.

As on an indictment for felony, a priſoner, by the rules of the common law, may be found guilty on the uncorroborated evidence of a ſingle witneſs; ſo, if the

jury believe the teſtimony of an *accomplice*, though ſuch teſtimony ſtands totally uncorroborated, a priſoner may be found guilty of a capital crime.

As in the KING, *v.* JAMES ATWOOD, and THOMAS ROBBINS, Summer aſſizes, at Bridgewater, county of Somerſet, 1788.

The priſoner was indicted for a robbery on the high-way—

The proſecutor depoſed, that on the day laid in the indictment, he was met by three men, who after uſing him with violence and threatening his life, demanded his money; and that in conſequence of their threats, he delivered to them the property mentioned in the indictment; but that it was ſo dark at the time, he could not ſwear that the priſoners at the bar were two of the men who robbed him.

An accomplice was under this circumſtance admitted to give his teſtimony; and he depoſed, that he and the two priſoners at the bar, had in company with each other, committed the robbery.

The jury, upon the evidence of theſe two witneſſes, found the priſoners *guilty*, but the judgment was reſpited, and the caſe ſubmitted to the conſideration of the twelve JUDGES.

BULLER, J. who had tried the priſoners, addreſſed them at the enſuing aſſizes, as follows: Priſoners, you were convicted of a highway robbery at the laſt ſummer aſſizes, at Bridgewater: the material circumſtances of the trial were theſe: the proſecutor gave in evidence that he was robbed by three men, on the day laid in the indictment, mentioning the converſation that paſſed during the robbery, and proving all the facts that are neceſſary in the law to conſtitute that offence; but as it was dark he could not ſwear to the perſon by whom it was committed.

The accomplice was then called who ſwore, that he and you had, in the company of each other committed this robbery; and he mentioned all the circumſtances that paſſed, which exactly correſponded with thoſe the proſecutor had before related.

On

On the teſtimony of theſe two witneſſes the jury found you guilty, but on a doubt ariſing in my mind, reſpecting the propriety of this conviction, I thought it proper to refer your caſe to the conſideration of the twelve judges.

My doubt was, whether the evidence of an accomplice, unconfirmed by any other evidence, that could immediately affect the caſe, was ſufficient to warrant a conviction?

And the TWELVE JUDGES were unanimous in opinion, that an accomplice *alone* is a competent witneſs. And that if the jury weighing the probability of his teſtimony, think him worthy of belief, a conviction ſupported by ſuch teſtimony *alone*, is perfectly legal.

The diſtinction between the *competency* and the *credit* of a witneſs hath been long known. If a queſtion be made reſpecting his *competency*, the deciſion of that queſtion is the excluſive province of the judge, but if the ground of his objection go to his *credit* only, his teſtimony muſt be received and left with the jury, under ſuch directions and obſervations from the court, as the circumſtances of the caſe may require, to ſay whether it be ſufficiently *credible* to guide their deciſion on the caſe.

An *accomplice* therefore being a *competent* witneſs, and the jury in the preſent caſe having thought him worthy of *credit*, the verdict *guilty* which has been found, is ſtrictly legal, though found on the teſtimony of the accomplice only. *Leach's Cr. Ca.* 2 *Edit.* 365. 3 *Edit.* 521.

So in the KING, *v.* DURHAM and CROWDER, *Old-Bailey, December ſeſſions*, 1787, on an indictment for burglary, in the dwelling houſe of *Hannah More*, and ſtealing therein a great quantity of wearing apparel.

The only evidence which affected the priſoners, aroſe from the teſtimony of *Francis Flemming*, a pawn-broker, who had been in the habit of receiving ſtolen goods for a ſeries of years, but who had impeached a great number of the principal offenders, and had been bound over by the juſtices of the peace to give evidence againſt them, as a witneſs for the crown.

The

The prisoners' counsel, by an examination of *Flemming* on the *voire dire*, endeavoured to prove him an accomplice in the burglary, in order to form an objection against the competency of his evidence, on the ground that no previous testimony of the prisoners' guilt had been given, and that under such circumstances the uncorroborated testimony of an accomplice could not be received.

The COURT said, that *Flemming* was to be considered rather as an accessary after the fact, than as an accomplice in the fact: but even admitting that he had been an accomplice, the objection would only go to his *credit*, and not to his *competency*; and *Atwood*'s case was cited as in point and conclusive, that the circumstance of a witness being an accomplice went to his *credit* only, and that his evidence might be left to the jury, although it was entirely uncorroborated by any other testimony; and that the practice of rejecting an unsupported accomplice, is rather matter of discretion with the court, than a rule of law. The jury found the prisoners *guilty*.

NOTE. There was evidence in this case by another witness, that a felony was committed; the matter was mentioned to the judges, and the prisoners received sentence of death. *Leach Cr. Ca.* 3 *Edit.* 539.

And *in* JORDAIN, *v.* LASHBROKE, *Easter*, 38 *Geo.* 3. GROSE, J. relies upon the case of the *King*, *v. Atwood*, and *Robbins*. His words are; a man shall not sustain an action upon a ground which proves him guilty of a breach of the law. So a man shall not recover money due upon an illegal consideration, such as usury, gaming, smuggling, or the like. But this rule does not extend to shut the mouths of witnesses guilty of criminal actions; if it did, witnesses daily received in courts of justice and whom the policy of the law invites to come forward, must be rejected; such as *accomplices* and others, concerned in illegal transactions; leaving their *credit* to the wisdom and discretion of a jury.

He then cited *Atwood*'s case, which he said was not founded on a new principle, for in *Hale* there are different instances of convictions, on the evidence of accomplices, one in 1672, of a conviction of *Hyde* for a robbery

bery on the highway, on the teſtimony of one who was a party in the robbery, but not indicted. The caſes cited for the defendant ſhew clearly what the policy of the law is, and that a man's guilt in the tranſaction diſcloſed, if he be not rendered *infamous* by *conviction*, and on that account incompetent, is not an objection to his teſtimony. 1 *Hale's P. C.* 303, 304, 305. 7 *Term. Rep. B. R.* 609, 610. Vide *Poſt* . *Atwood's caſe.*

Rule the Fourth.

This rule is only applicable to Ireland. As the evidence of one witneſs is ſufficient to convict at common law, and *approvers* and *accomplices* being competent witneſſes in Ireland, a defendant to an indictment for high treaſon, may be convicted on the uncorroborated teſtimony of an approver or accomplice, charging himſelf with treaſon, felony, or any other infamous crime or crimes, of which he has not been previouſly convicted. Vide *ca.* 5. *on the number of witneſſes required in high treaſon.* *Ante*

Rule the Fifth.

Accomplices who are *indicted* are good witneſſes for the king until they be convicted. 2 *Hawk. Pl. Cr. ca.* 46.

This appears in the caſe of TONGE, before cited, where it was reſolved by the judges, that the law alloweth every one to be a witneſs, who is not convicted or made infamous for ſome crime. *Kelyng.* 17. 3 *Keb.* 136. *Ante* .

So *approvement*, which is a ſpecies of confeſſion, does not deſtroy the competency of the approver, though he ſtands as if indicted, and if he fail in proving the appellee guilty, he ſhall be hanged. 1 *Hale P. Cr.* 303. *Stamf. Pl. lib.* 2. *ca.* 56. 145. *a.* 4 *Black. Comm.* 129. *Ante*

Rule the Sixth.

A promiſe of *pardon* to an accomplice doth not affect his competency, on the trial of the party accuſed by him.

An *approver* is inſured his pardon, if he makes good his accuſation againſt the appellee, ſo by analogy it appears, that a promiſe of pardon to an accomplice does not affect his *competency*, but goes merely to leſſen his *credit* with the jury.

As in the caſe of the KING, *v.* TONGE, above cited.

And in the caſe of the KING, *v.* CHRISTOPHER LAYER, *Mich.* 9 *Geo.* 1. *Banco Regis.*

Stephen Lynch, an accomplice, being produced, the priſoner demanded that he ſhould be examined on the *voire dire*, whether he had not a promiſe of pardon, or ſome other reward for ſwearing againſt him. But this demand, after long debate, was over-ruled, as being a queſtion, which if anſwered in the affirmative, would not take off his teſtimony by rendering him *incompetent*. The queſtion propoſed aroſe (as EYRE, J. obſerved) from the *influence* which the *hopes of pardon* might poſſibly have upon the witneſs, and if this was a reaſon for ſetting aſide a witneſs as *incompetent*, no accomplice who diſcovered a conſpiracy, could ever be allowed to prove it upon oath, for no man ever made diſcovery but with hopes of pardon. Such perſons have always been allowed to be witneſſes. In the *King*, *v. Gordon*, the priſoner's counſel would have aſked the ſame queſtion, but the court did not think it proper before the witneſs was ſworn, becauſe the queſtion did not affect his *competency* but his *credit*. And Mr. Juſtice ALAND, ſaid, the reaſon the court gave in *Gordon*'s caſe for refuſing this queſtion on the *voire dire*, was, that if he had this promiſe, ſuch promiſe was made either to ſpeak the truth, or to ſpeak a falſehood; if it was to give a juſt and true evidence, there was no harm in it; and if it was a promiſe of pardon for ſpeaking that which was not true, the witneſs was not bound to anſwer that queſtion, and conſequently it can be of no uſe whatſoever. Therefore

the

the witneſs muſt be ſworn. *Layer Tr. folio edit.* 476; *St. Tr.* 257.

Sir *Matthew Hale* holds a contrary opinion, he ſays, "For my own part, I have always thought, that if a "perſon have a promiſe of pardon, if he gives evidence "againſt one of his own confederates, this diſables his "teſtimony, if it be proved againſt him." 2 *Hales Pl. Cr.* 280.

Rule the Seventh.

An accomplice may give evidence before a grand-jury to ſupport an indictment againſt a *particeps criminis*; and the bill found is good, although the accomplice was not previouſly admitted an evidence for the crown.

As in the KING, *againſt* WILLIAM DODD, doctor of laws, *Old-Bailey, February ſeſſions*, 1777. Indictment for forgery, on *ſtat.* 22 *Geo.* 2. *ca.* 25. before GOULD and WILLES, J's. and HOTHAM, B.

The names *William Dodd* and *Lewis Robertſon*, both to the bond, and to a receipt as atteſting witneſſes of the ſignature, *Cheſterfield*. They were charged with being equally guilty of the forgery; and from the evidence given againſt them before the magiſtrate, he committed them as principal felons to Newgate.

The indictment was preferred againſt *William Dodd* only. The agent for the proſecution obtained an order from the clerk of the arraigns, directed to the keeper of Newgate, commanding him to carry *Lewis Robertſon* before the grand-jury, for the purpoſe of giving evidence to ſupport the indictment againſt *William Dodd*; and he was examined before the grand jury accordingly.

The indictment was found and the name of *William Robertſon*, among others, indorſed on it, as a witneſs for the crown. The juſtices of gaol delivery being informed of theſe tranſactions, made an order, declaring the firſt order *illegal* and void, as having been ſurreptitiouſly obtained.

Doctor *Dodd*, on his being called to arraignment on this indictment, ſubmitted to the court, that as *Lewis Robertſon* was in cuſtody under a legal warrant of com-

 mitment,

mitment, as a principal in the offence with which *he* was charged, and without having been admitted a witneſs for the crown by any legal authority, had been carried before, and examined before the grand jury, by virtue of a ſurreptitious and illegal order, the indictment againſt *him* (the priſoner on trial) had been found upon improper evidence, and therefore he ought not to be compelled to plead to it.

After argument by *Howarth*, *Cowper*, and *Buller*, for the priſoner, and *Mansfield* and *Davenport* for the crown, it was agreed that the trial ſhould proceed; and on the jury finding the priſoner *guilty*, the ſentence was reſpited, and the queſtion ſubmitted to the conſideration of the *twelve judges*.

ASTON, J. delivered the reſult of their conference to this effect. The JUDGES have fully conſidered the whole matter of this objection, and they are unanimouſly of opinion, that the neceſſity of ſome proper authority, to carry a witneſs who happens to be in cuſtody, before the grand jury to give evidence, regardeth the juſtification of the gaoler only; but that no objection lies on that account in the mouth of the party indicted: for in reſpect to him, the finding is right, and according to law.

Whether a private proſecutor by uſing an *accomplice*, in or out of cuſtody as a witneſs, gives ſuch a witneſs a plea not to be proſecuted, or can intitle the proſecutor himſelf to have his recognizance diſcharged, is a matter very fit for conſideration whenever that queſtion ſhall ariſe: but it is a matter in which the party indicted hath no concern; nor can he make any legal objection to the producing ſuch a perſon as a witneſs; for the accomplice is againſt him a *legal* and a *competent* witneſs; and ſo was *Lewis Robertſon*, upon the bill of indictment found upon this occaſion.

The judges therefore are of opinion, that the proceedings upon that indictment were legal, and that the priſoner was convicted according to law. He was executed. *Leach's Cr. Caſes*, 2 *Edit.* 141. 3 *Edit.* 184.

Rule the Eighth.

The admitting an accomplice as a witneſs for the crown is not a matter granted of courſe by the court, but depends upon the queſtion, whether the indictment can be found and ſupported without his evidence.

As in the KING, *v.* ROBERT and WILLIAM LUCKHURST, *Maidſtone, Lent aſſizes*, 1798.

Counſel for the crown, moved, that *Avery*, an accomplice, might be brought before the grand jury to give evidence on a bill of indictment.

BULLER, J, ſaid, it was not a motion of courſe, and he therefore requeſted the counſel to read over his brief, and certify that there was not ſufficient evidence to convict, without the teſtimony of the *accomplice*, otherwiſe he would not allow the motion; becauſe it might be the means of letting off the worſt offender, and puniſhing thoſe to whom otherwiſe, according to circumſtances, mercy might be ſhewn; and he inſtanced a ſimilar caſe that happened at York aſſizes.

The *counſel* then ſtated, that this *accomplice* had been before admitted king's evidence againſt the others by the committing juſtice.

BULLER ſaid, that he would not pay any regard to that, becauſe it ought not to be in the power of a juſtice of the peace to ſay, who ought and who ought not to be admitted king's evidence.

The *counſel* thereupon ſaid, that he thought, on reading the indictment and his brief, the *accomplice* ought to be admitted ſuch evidence, and his motion was granted. *Crown Cir. Comp. by Dougherty. 7 Edit.* 138, 139. Vide *Rudd's ca. Ante* . *Doctor Dodd's ca. Ante*

Rule the Ninth.

But it hath been an almoſt invariable rule of clemency, with the judges, that unleſs ſome fair and unpolluted evidence, corroborate and give veriſimilitude to the teſtimony of an accomplice, to recommend to the mercy of

the crown, a priſoner convicted under ſuch circumſtances.

And this principle of mercy, and the rule that the objection to the evidence of a *particeps criminis* affects his *credit* only, but does not bar his *competency*, was long ſince promulged by that moſt excellent judge ſir *Matthew Hale*, who ſaith, that though a *particeps criminis* be admiſſible as a witneſs in law, yet the *credibility* of his teſtimony is to be left to the jury; and truly it would be hard to take away the life of any perſon upon ſuch a witneſs, that ſwears to ſave his own, unleſs there be alſo very conſiderable circumſtances which may give the greater credit to what he ſwears. 1 *Hale Pl. Cr.* 305.

And on the high trials for high treaſon, previous and ſubſequent to the breaking out of the rebellion in Ireland, the judges conſtantly reminded the juries of the queſtionable ſhape in which approvers appeared, and the diſcredit which their own confeſſions attached to their evidence.

Rule the Tenth.

In miſdemeanors parties indicted ſeparately from the party on trial, or not indicted, though concerned in the tranſaction, are *competent* witneſſes; and the ſame rule holds good in many ſpecies of civil action, where the witneſs is not made a defendant.

As if A. and B. be indicted for aſſaulting the ſame perſon, and tried ſeparately, they are good witneſſes for each other.

So where A. B. and C. are ſued in three ſeveral actions on the ſtatute, for a ſuppoſed perjury, in their evidence concerning the ſame thing, they may be good witneſſes in ſuch action for one another. 2 *Hawk. Pl. Cr. ca.* 46.

So in CLARKE, *v.* SHEE and JOHNSON, in *aſſumpſit*, on the common counts, to recover back money the property of the plaintiff, loſt by *David Wood*, clerk to the plaintiff, at inſuring in the lottery, contrary to the ſtatute. It appeared in evidence, that the money in queſtion was the identical money loſt at inſuring, and which

Wood

Wood had received to his maſter's uſe: but it was objected, that *Wood* being a *particeps criminis*, ſhould not have been admitted as a witneſs on the trial, for that no man ſhould be allowed to prove his own turpitude, as perjury or the like: whereas this man was called to prove himſelf guilty of a breach of truſt, in embezzling his maſter's money, and alſo a breach of the act of parliament. The court held on this objection, there could be no doubt but *Wood* was an admiſſible witneſs.

And in BUSH, *v.* RALLING, *Trinity*, 29 & 30 *Geo.* 2. *Banco Regis*, the principles before laid down were recognized as law. Motion for a new trial. The action was debt, on *ſtat.* 2 *Geo.* 2. *ca.* 24. by which it is enacted, "That if any perſon, by himſelf, or any perſon employed by him, ſhall by any gift or reward, or by any promiſe, agreement, or ſecurity, for any gift or reward, corrupt or procure any perſon to forbear to give his vote, in any election for a member of parliament, ſuch perſon ſhall forfeit the ſum of five hundred pounds."

The declaration alledged, that *Ralph Thrale*, eſq. while candidate for the borough of *Abingdon*, did corrupt *John Hervey*, to forbear to give his vote, by giving him twenty guineas.

FOSTER, J. ruled, that *Hervey* was a competent witneſs.

The COURT concurred in the rule. There are two objections, namely, that *Hervey* was a *particeps criminis*, and that the tendency of his evidence was to diſcharge himſelf from penalties and diſabilities. It would perhaps be a full anſwer to theſe objections to ſay, that a *particeps criminis*, although the tendency of his evidence be to obtain a pardon, or even a reward for himſelf, is, in divers caſes a competent witneſs: but by the ſtatute, there is a legiſlative declaration, that one perſon offending againſt this act may be witneſs againſt another offending againſt it.

In PHILIPS, *v.* FOWLER, it was ruled at *Niſi Prius*, by EYRE, Chief Juſtice of the Common Pleas, that *Hoare*, to whom money had been given to forbear to vote for a candidate, was a competent witneſs againſt the

the giver of the money, in an action under this ſtatute, and the chief juſtice ſaid, unleſs the evidence of the taker of the money, notwithſtanding he is a *particeps criminis* be in ſuch caſe admitted, the ſtatute will be of very little avail. *Sayer* 289, 290. And Vide *Jardain*, v. *Laſhbrook*. 7 *Rep.* 609, 610. *Ante*

CHAPTER XVIII.

On the competency of perſons convicted or attainted.

BY the older authors it appears, that a *conviction*, and therefore *a fortiori* an attainder or judgment of treaſon, felony, premunire, perjury, forgery, on the ſtatute of 5 *Eliz.* and alſo a judgment in attaint, in giving a falſe verdict; or in conſpiracy at the ſuit of the king; and alſo judgment for any crime whatſoever to ſtand in the pillory, to be whipt, or branded, being in a court which had a juriſdiction, are good cauſes of exception againſt a witneſs, while they continue in force. 2 *Hawk. Pl. Cr. ca.* 46. 1 *Hale Pl. Cr.* 306. *Crompt. de hæc Regis. Dalt. ca.* 111. *New Edit. ca.* 164. *p.* 564.

And COKE ſays, that if a man by *judgment* hath loſt his ears, or ſtood upon the pillory, or tumbrel, or being ſtigmatized or the like, whereby he becomes *infamous* for ſome offence, he ſhall not be ſworn as a witneſs. *Co. Litt.* 6. *b.* 3 *Inſt.* 219. 2 *Hale Pl. Cr.* 277, 278.

Rule the Firſt.

But according to modern authorities, it is the *infamy* of the *crime*, and not the *puniſhment*, which diſqualifies from being a witneſs; and therefore perſons ſtigmatized by an infamous puniſhment, ſuch as being ſet in the pillory, are admiſſible witneſſes; unleſs the puniſhment was inflicted for *forgery*, *perjury*, or other ſpecies of the *crimen falſi*, or other crime of an *infamous* nature. 2 *Hawk. Pl. Cr. ca.* 46.

Lord

Lord Chief Baron GILBERT aſſigns the reaſon that perſons ſo ſtigmatized, ſhould be excluded from giving teſtimony. It is becauſe every plain and honeſt man affirming the truth of any matter under the ſanction of an oath, is intitled to faith and credit; ſo that under ſuch atteſtation the fact is underſtood to be fully proved. But where a man is convicted of falſity and other crimes, againſt the common principles of honeſty and humanity, his oath is of no weight, becauſe he hath not the credit of a witneſs, and there is a greater *preſumption* againſt him, than can be on his behalf.

For the preſumption is benign and humane to every man produced as a witneſs, that he will not falſify or prevaricate, in matters of ſuch importance as all affairs of juſtice are; but where a man is a notorious and public criminal this preſumption fails him: and from thenceforth he is rather to be intended as a man profligate and abandoned, than one under the ſentiments and conviction of thoſe principles that teach probity and veracity; and conſequently, the producing ſuch a man is ineffectual, becauſe the credit of his oath is overbalanced by the ſtain of his iniquity. *Gilb. Evid. by Loft.* 256. 2 *Bulſt.* 154. *Brac. b.* 4. *ca.* 19. *ſect.* 2. *Flet. b.* 4. *ca.* 8. *ſect.* 2. *Bro. ca.* 15.

The common puniſhment that indicates the *crimen falſi* is being ſet in the pillory; and, therefore, they antiently held the law to be, that no man legally ſet in the pillory could be a witneſs, for they thought it a ridiculous thing and boding ill to a cauſe, when a perſon thus ſtigmatized appeared in court to atteſt any thing; but the rigour of this is reduced to reaſon: for now it is held, that unleſs a man be put in the pillory for *crimen falſi*, as for perjury, forgery, or the like, it is no blemiſh to a man's atteſtation; for a man may be pillored for ſpeaking ſcandalous words of the government, which yet, in doubtful and factious times, ought not to be taken as a preſumption againſt his common credibility. *Ex delicto, non ex ſupplicio, emergit infamia. Ibid.* 257.

In PENDOCK, *on the deviſe of* MACKENDER, *v.* MACKENDER, *Hilary*, 28 *Geo.* 2. 1755. *Common Pleas.* The point appears to have been ſettled. Ejectment for lands

in

in Kent. A caſe was reſerved from the aſſizes, by which it appeared, that J. M. being ſeized of the lands in queſtion, by his will, executed in 1750, deviſed the lands to the defendant. That there were three witneſſes to the will; that *Joſeph Jefferies*, one of the witneſſes, before the time of atteſtation thereof, was indicted, tried, and convicted of ſtealing a ſheep, and was found guilty to the value of ten pence, and had judgment of whipping.

The plaintiff claimed as heir at law to the teſtator, and therefore the ſingle queſtion was—Whether one convicted and whipped for petit larceny be a competent witneſs, within the ſtatute of frauds and perjuries.

The COURT, after three arguments at the bar, were clearly of opinion, that *Joſeph Jeffries* was not a competent witneſs, and laid it down as a rule, that it is the *crime* that creates the infamy and takes away a man's competency, and *not* the *puniſhment* of it: and it is abſurd and ridiculous to ſay, it is the puniſhment that creates the infamy.

The pillory has always been looked upon as infamous, and to take away a man's competency as a witneſs; but this notion is very abſurd, for ſuppoſe a man convicted on the ſtatute 4 *Will. & Mary*, againſt deer-ſtealing, there is a penalty of thirty pounds to be levied by diſtreſs, and if he has no diſtreſs he is to be put in the pillory, ſo that if the pillory be infamous, the perſon convicted (according to this notion) will be infamous, if he has not thirty pounds; but, if he has thirty pounds he will not be infamous.

In the preſent caſe, both the crime and the puniſhment are infamous; and he that ſteals a penny, has as wicked a mind as he that ſteals a larger ſum, if not a more wicked mind, for he has the leſs temptation. Petit larceny is felony; and no caſe has been cited, where a perſon convicted thereof was ever admitted to be a witneſs. Judgment for the plaintiff *per totam curiam*. 3 *Wilſ.* 18, 19.

But it has been ſince enacted, "That a conviction of "*petit larceny* ſhall not incapacitate the party convicted "from

" from being a competent witneſs." *Engliſh*, 31 *Geo.* 3. *ca.* 35. *Iriſh*, 36 *Geo.* 3. *ca.* 29.

With the deciſion above cited from *Wilſon*'s reports, the civil and common law agrees, for by thoſe laws no ſuch *judgment* diſables a witneſs from giving teſtimony, unleſs the nature of the crime be infamous. 3 *Lev.* 426, 427.

Rule the Second.

But where the conviction and judgment is for an offence recognized by law as infamous in its nature, though not attended by what is termed infamous puniſhment, yet the delinquent is rendered incompetent to give evidence in a court of juſtice.

In the KING, *v.* FORD, *Mich.* 12 *Will.* 3. *Banco Regis.* It was objected that a witneſs produced was convicted of *barratry*, and the record was produced. The judgment was, to be fined five hundred marks, but not to ſtand in the pillory.

On the other ſide it was argued, that a bare conviction of perjury would take away evidence, becauſe it is an infamous crime; but not ſo of *barratry*, which was not of an infamous nature, without an infamous puniſhment, as the pillory.

HOLT, C. J. He is diſabled by the conviction, for it is the nature of the crime and conviction that creates the infamy. 2 *Salk.* 690. And Vide the laſt cited caſe. 1 *Wilſ.* 18.

So in the KING, *v.* GEORGE CROSSLEY, *Trinity*, 27 *Geo.* 3. 1787, *B. R. Niſi Prius*, at Weſtminſter.

William Priddle, *Thomas Holloway*, and *Stephen Stephens*, were indicted at the *Old-Bailey*, *April ſeſſions*, 1787, of conſpiracy to indict *George Croſsley*, an attorney, for perjury, for which he had been tried at the *Old-Bailey*, and was acquitted. They were ſentenced to pay a fine of ſix ſhillings and eight pence each, and to be impriſoned in his Majeſty's gaol of Newgate: *Priddle* for the term of two years; and *Robert Holloway*, and *Stephen Stephens*, for the term of eighteen months.

While in priſon under this ſentence, *George Croſsley*, the proſecutor for the crown, on the indictment for the conſpiracy, was himſelf indicted at Hicks's-hall for wilful and corrupt perjury, and the indictment being removed into the court of King's bench, came on to be tried at *Niſi Prius*, at *Weſtminſter*, *Trinity*, 1787, before BULLER, J.

William Priddle was produced at the trial as a witneſs on the part of the crown. He was examined on the *voire dire* by the traverſer's counſel, and acknowledged that he had been convicted of the *conſpiracy* above ſtated, and was that morning brought up by *habeas corpus* from the gaol of Newgate, where he was impriſoned for that offence.

The traverſer's counſel objected to his being examined: ſubmitting to the court that a conviction on an indictment for conſpiracy, rendered the party convicted *infamous*, and of courſe deſtroyed his competency as a witneſs.

BULLER, J. Acceded to the legality of the objection; obſerving, that *conſpiracy* was a crime of a blacker die than *barratry*, and the teſtimony of a perſon convicted of *barratry* had been rejected. 2 *Salk.* 690. *Ante* .

He ſaid, that it is now ſettled law, that it is the infamy of the crime which deſtroys the competency of a perſon convicted, and not the nature or mode of puniſhment; and therefore a conviction of any offence, which is comprehended under the denomination of *crimen falſi*, deſtroys the competency of the perſon convicted: and among other caſes, he mentioned perjury and forgery, by the common law. The teſtimony of *Priddle* was of courſe rejected, and *Croſsley* was acquitted. *M. S. Leach's Cr. Ca.* 349, 350.

NOTE. The ſame *George Croſsley* was ſome years afterwards convicted of perjury, and received ſentence to be tranſported. *Term. Rep.*

NOTE. On a conviction for a conſpiracy, *Hawkins* confines the incapacity of a witneſs to a conviction, *particularly* at the ſuit of the king; but other writers ſay generally, that one attaint of conſpiracy cannot be a witneſs,

witneſs, as in the above caſe. 1 *Hale Pl. Cr.* 306. *Cromp. de Pace Regis.* 172. *Dalt. ca.* 111. *p.* 542.

Rule the Third.

The conviction of a defendant on a charge of an infamous nature, does not complete incompetency to conſummate that incapacity, judgment muſt follow; but execution thereof is not neceſſary.

So in the KING, *v.* CROSBY, *Eaſt.* 7 *Will.* 3. *B. R.* The court held, that where the ſentence of the pillory is paſſed, if the crime be of an *infamous* nature, it is not neceſſary that the defendant ſhould have ſuffered the ſentence to render him an incompetent witneſs; for it is the *judgment* which creates the infamy and not the execution of the puniſhment. 2 *Salk.* 688. 2 *Inſt.* 219.

And in LEE, *v.* GANSELL, *Hilary*, 14 *Geo.* 3. An affidavit of *Lee*, the plaintiff, was offered to be read. Objected, that he ſtood convicted of perjury, and the conviction was produced.

Lord MANSFIELD, C. J. A *conviction* upon a charge of perjury is not ſufficient, unleſs followed by a *judgment*; I know of no caſe where a conviction alone has been an objection, becauſe upon a motion in arreſt of judgment, the conviction may be quaſhed. 3 *Comp.* 3. *M. S.*

Rule the Fourth.

Judgment for an infamous crime, which renders a man incompetent as a witneſs, doth not diſable him from making an affidavit in defence of a charge brought againſt him.

This has been repeatedly ruled on motions for informations and attachments, &c. in the King's bench.

As in DAVIS, *v.* CARTER, *Hil.* 8 *Will.* 3. and *Mich.* 4 *Anne*, *Banc. Reg.* A motion was made, to ſet aſide a judgment for irregularity, on the defendant's affidavit. *Whitacre* objected to the reading of it, becauſe he was convicted of perjury.

HOLT, C. J. Muſt he therefore ſuffer all injuries and have no way to help himſelf? Had you the record of conviction in your hand it would make no difference. The affidavit was read. 2 *Salk.* 461.

Rule the Fifth.

But though a man againſt whom there is judgment for an infamous crime, is admitted to anſwer a charge againſt himſelf by affidavit; yet he is not allowed to ſupport a complaint, or to do other acts of a judicial nature upon his own oath.

As in the KING, *v.* DAVIS, and CARTER, *Hil.* 7 *Will.* 3. *Banc. Reg.* *Davis* and *Carter* had ſtood in the pillory, and the court would not allow their affidavits to be read. Vide *Ante* . *S. C.* 1 *Salk.* 461.

So in NICHOLSON, *v.* DALLYHUNT. Affidavit to hold to bail, made by the plaintiff's wife, who being convicted of pocket-picking was tranſported; and afterwards being convicted of returning from tranſportation, received judgment of death. Theſe matters appearing upon record—The COURT held ſhe could not be a witneſs in any caſe.

And in WALKER, *v.* KEARNEY, 14 *Geo.* 2. *Ban. Reg.* A rule for an attachment *niſi* being granted on the affidavit of the defendant, the party complained of, ſhewed for cauſe, that the defendant had been convicted of forgery and ſtood in the pillory, and produced the record and an affidavit of the identity of the perſon.

The COURT diſcharged the rule, becauſe the affidavit of a perſon who has received judgment of an infamous crime cannot be read to ſupport a complaint—but may to defend a charge againſt him. 2 *Stra.* 1148.

Rule the Sixth.

Whenever the competency of a witneſs is objected to on the charge of conviction and judgment on an infamous crime, the party making the charge muſt produce in court the record of the judgment. 2 *Hawk. Pl. Cr. ca.* 46. 4 *St. Tri.* 175.

And

And this rule refults from the great general and pervading principle, that the beſt evidence the caſe admits of muſt always be produced.

CHAPTER XIX.

Of the legal Acts which reſtore Competency to Perſons convicted of infamous Crimes.

Rule the Firſt.

A PERSON convicted of felony, who is admitted to his clergy, and *burned in the hand*, is thereby enabled to be a witneſs; for the burning in the hand operates as a ſtatute pardon. 2 *Hawk. Pl. Cr. ca.* 46.

Or, as ſome legal writers explain this rule, the burning in the hand is in the nature of a ſtatute pardon: being a condition or performance, of which the diſcharge from puniſhment, and the reſtitution of credit takes place. 4 *Blackſ. Comm.* 367. *Poſt* .

Perfectly to underſtand the caſes which illuſtrate the preceding rule, it is neceſſary to define the privilege termed BENEFIT OF CLERGY.

CLERGY, the *privilegium clericale*, in common ſpeech *benefit of clergy*, had its origin from the pious regard paid by chriſtian princes to the church in its infant ſtate, and the ill uſe which the eccleſiaſtics made of that regard. The particular privilege now treated of, was the exemption of the *perſons* of clergymen from criminal proceſs before the ſecular judge, in a few certain caſes.

This privilege, in proceſs of time, they claimed as their inherent right, as a right indefeaſible and *jure divino*; and by their canons and conſtitutions extended this exemption, as well in regard to the crimes themſelves, of which the liſt became univerſal, as in regard to the perſons exempted, among whom were at length comprehended, not only every officer belonging to the church or clergy, but many that were totally laymen. *Kielw.* 180. 2 *Hale P. C.* 377.

In

In England, a total exemption of the clergy from ſecular juriſdiction could never be thoroughly effected; therefore, though the antient *privilegium clericale* was in *ſome* capital caſes, yet it was not univerſally allowed. In thoſe particular caſes the uſe was for the biſhop or ordinary to demand his clerks to be remitted out of the king's courts as ſoon as they were indicted, concerning the allowance of which demand there was great uncertainty, until the reign of *Henry 6.* when it was ſettled, that the priſoner ſhould firſt be arraigned, and might either *then* claim his benefit of clergy, by way of *dilitory* plea, or *after conviction*, by way of arreſting judgment.

Originally no man was admitted to the benefit of clergy but ſuch as had the *habitum tonſuram clericalem;* but, in proceſs of time, every one who could read, being accounted *clericus*, was allowed the benefit of clerkſhip; but it being found, that as many laymen as divines were admitted to the *privilegium clericale*, and therefore by *ſtat. 4 Hen. 7. c.* 13. a diſtinction was once more drawn between mere lay ſcholars, and clerks that were really in orders; which ſtatute directs, that no perſon once admitted to the benefit of clergy, ſhall be admitted thereto a ſecond time, unleſs he produces his orders, and all laymen, who are allowed this privilege, ſhall be burnt with a hot iron in the brawn of the left hand. This diſtinction between learned laymen and real clerks in orders, was aboliſhed for a time by the ſtatutes 28 *Hen. 8. ca.* 1. *and* 32 *Hen. 8. ca.* 3. but is held to have been virtually reſtored by *ſtat. 1 Edw. 6. ca.* 12. which ſtatute alſo enacts, that lords of parliament, and peers of the realm may have the benefit of their peerage, equivalent to that of clergy, for the firſt offence (although they cannot read, and without burning in the hand) for all offences then clergyable to commoners, and alſo for the crime of houſe-breaking, highway-robbery, horſe-ſtealing, and robbing churches. 2 *Hales P. C.* 372. *Hob.* 294.

Note. The dutcheſs of *Kingſton* pleaded under this ſtatute in bar of execution, on a conviction for *bigamy*, 11 *St. Tr.* 198.

After

After this burning the laity, and before it, the clergy were discharged from the sentence of the law in the king's courts, and delivered over to the ordinary to be dealt with according to the ecclesiastical canons. Whereupon the ordinary proceeded to make a *purgation* of the offender by a canonical trial before the bishop in person, and a jury of twelve clerks; and there first, the party himself, was required to make oath of his own innocence; next there was to be the oath of twelve *compurgators*, who swore they believed he spoke the truth; then the witnesses were to be examined upon oath, but on behalf of the prisoner only; and lastly, the jury were to bring in their verdict upon oath, which usually acquitted the prisoner: otherwise, if a clerk, he was degraded, or put to penance. *Rex, v. Burridge*, 3 *P. Will.* 447.

Hobart, J. remarks, with indignation, on the vast complication of perjury, and subornation of perjury, in this mock trial: the witnesses, the compurgators, and the jury, being all of them partakers in the guilt; the delinquent party also, though convicted before on the clearest evidence, and conscious of his own offence, yet was permitted to swear himself not guilty, nor was the bishop exempt from a share in the wickedness; and yet by this *purgation* the party was restored to his credit, his liberty, his lands, and his capacity of purchasing afresh, and was entirely made a new and an innocent man. *Hob.* 291. 3 *P. Will.* 448.

This shameful prostitution of the forms of justice, was the cause, that upon very heinous and notorious circumstances of guilt, the temporal courts would not trust the ordinary with the trial of the offender, but delivered over to him the convicted clerk, *absque purgatione facienda*, in which situation the clerk convict could not make purgation; but was to continue in prison during life, and was incapable of acquiring any personal property, or of receiving the profits of his lands, unless the king should pardon him: but when the reformation was established, the whole ceremony was abolished.

Accordingly *stat.* 18 *Eliz. ca.* 7. enacts, that for the avoiding such perjuries and abuses, after the offender has been allowed his clergy, he shall not be delivered to the ordinary

ordinary as formerly; but upon ſuch *allowance* and *burning in the hand*, he ſhall forthwith be enlarged and delivered out of priſon; with proviſo that the judge may, if he thinks fit, continue the offender in gaol for any time not exceeding a year. Thus the law continued until *ſtat.* 21 *Jac.* 1. *ca.* 6. allowed that women convicted of ſimple larcenies, under the value of ten ſhillings, ſhould (without being called to read) be burned in the hand, whipped, ſtocked, or impriſoned, for any time not exceeding a year: and by *ſtat.* 3 *and* 4 *Will.* & *Mary*, *ca.* 9. and 4 & 5 *Will.* & *Mary*, *ca.* 24. a ſimilar indulgence was extended to women guilty of any clergyable felony whatſoever, who were allowed to claim the benefit of *the ſtatute* in like manner, as men might claim the benefit of *clergy*, and to be diſcharged upon being *burned in the hand*, and impriſoned for any time not exceeding a year. *Iriſh ſtatutes* 11 *Jac.* 1. *ca.* 3. *ſect.* 2. 1 *Stat. at large* 437. 10 *Car.* 1. *ca.* 16. *ſec.* 3. 2 *Stat. at large*, 117. 9 *Will.* 3. *ca.* 7. 3 *Stat. at large* 373.

Still however thoſe men who could *not read*, if under the degree of *peerage*, were hanged; but by *ſtat.* 5 *Ann.* *ca.* 6. it was enacted, that the benefit of clergy ſhould be granted to all thoſe who were intitled to aſk it, without requiring them to read by way of conditional merit.

But this univerſal lenity being an encouragement to commit the lower degrees of felony, and capital puniſhments being too rigorous for inferior offences, it was enacted, that when any perſon ſhall be convicted of any larceny, either grand or petit, or ſhall be entitled to the benefit of clergy, or liable only to the penalties of burning in the hand, or whipping, the court, in their diſcretion, inſtead of ſuch burning in the hand or whipping, may direct ſuch offenders to be tranſported to America for ſeven years; and if they return within that time, it ſhall be felony without benefit of clergy. *Stat.* 4 *Geo.* 1. *ca.* 11. & 6 *Geo.* 1. *ca.* 23.

As to the conſequences of allowing the offender the *benefit of clergy*; they are ſuch as affect his preſent intereſt and future credit and capacity: as having been once a felon, but now purged from that guilt by the privilege of clergy, which operates as a kind of ſtatute pardon.

4 *Black. Comm.* 387. *Iriſh ſtat.* 9 *Anne ca.* 6. *ſect.* 5. 4 *Stat. at large*, 262.

Firſt, the offender by his conviction forfeits all his goods, which being once veſted in the crown, ſhall not be afterwards reſtored. *Secondly*, that after conviction, and until he receives the judgment of the law, by branding or the like, or elſe is pardoned by the king, he is to all intents and purpoſes a felon. *Third*, that after burning or pardon, he is diſcharged for ever of that, and all *other* felonies before committed, within the benefit of clergy, but not of felonies from which ſuch benefit is excluded, and this by *ſtatutes* 8 *Eliz. ca.* 4. and 18 *Eliz. ca.* 7. *Fourth*, that by the burning or pardon of it, he is reſtored to all capacities and credits, and the poſſeſſion of his lands, as if he had never been convicted. *Fifth*, that what is ſaid with regard to the advantages of commoners and laymen, ſubſequent to the burning in the hand, is equally applicable to all peers and clergymen, *although never branded at all.* For they have the ſame privileges without any burning, which others are entitled to after it. 1 *Hale P. C.* 529. *Foſter* 356. 2 *Hale P. C.* 388. 3 *P. Will.* 487. 2 *Hale P. C.* 389. 5 *Rep.* 110. 2 *Hale P. C.* 389, 390.

At the *Old-Bailey ſeſſ. Decemb.* 1664, by HYDE, C. J. KELYNG, J. and WILD, Rec. *Lond.* The priſoner (his name is not reported) took exception againſt the witneſs, becauſe he had formerly been burned in the hand for felony.

The COURT over-ruled the exception. In civil cauſes ſuch perſons are frequently admitted as witneſſes, and it differs from cutting off ears, ſtanding in the pillory or other ſtigmatizing, becauſe thoſe puniſhments make the perſons infamous. But *burning* in the hand doth not ſo, becauſe it cometh in the place of *purgation* at the common law, which ſuppoſeth he might be not guilty, notwithſtanding the verdict. And therefore at the common law, he that confeſſeth a felony could never be admitted to his purgation; for there could be no preſumption of not guilty againſt his own confeſſion. *Kelyng* 37, 38. *Bulſt.* 155. 2 *Hawk. Pl. Cr. ca.* 33 & 37. *Styles* 388. Vide *Godb.* 288. Vide FOXBY's *caſe*, 5 *Co.*

110. for analogous points. *Ventr.* 349. *Skin.* 578. 2 *Siderf.* 51. *Hob.* 81.

NOTE. The infamy muſt reſult from the nature of the offence, not from the puniſhment. Vide *Ante* . And *ſee ſtat.* 18 *Eliz. ca.* 7. by which it is enacted, that after clergy allowed, and burning in the hand, the priſoner ſhall be preſently enlarged and delivered out of priſon.

So in the KING, *v.* ROGER PALMER, earl of Caſtlemain, 32 *Car.* 2. *B. R.* for high treaſon. On an objection made by the earl to the competency of *Dangerfield*, and argument by *Darnell*, his counſel, who was aſſigned him; the court having conſulted with the juſtice of the common pleas.

SCRAGGS, C. J. addreſſing the priſoner, ſaid,—"I will "tell you what my brethren's opinions are; both points "were put to them, *Firſt*, that *Dangerfield* was convicted "of felony and burned in the hand for it: *Secondly*, that "he was outlawed for felony and hath a general pardon. "They are of opinion, that a general pardon would not "reſtore him to be a witneſs after outlawry for felony, "becauſe of the intereſt which the king's ſubjects have "in him: but they ſay further, that where a man comes "to be *burned in the hand*, there they look upon that as "a kind of a more general diſcharge than a pardon alone "would amount to, if he had *not* been burned in the "hand; they ſay if he had been convicted of felony, "and not burned in the hand, the pardon would not "ſet him upright, but being convicted and burned in "the hand they ſuppoſe he is a witneſs. The very at-"tainder is taken away, and ſo all is ſure." 3 *St. Tr.* 46, 47.

In the KING, *v.* the earl of WARWICK, before the lords, 12 *Will.* 3. *March*, 1699, for the murder of *Richard Coote*, eſq.

The earl offered as a witneſs, Mr. *French*, who had been convicted of manſlaughter, in killing Mr. *Coote*, the ſame perſon for whoſe murder his lordſhip ſtood indicted.

The objection to the competency of the witneſs was, that he had not been burned in the hand, nor obtained a pardon

pardon under the great ſeal, though the pardon had actually paſſed the privy ſeal.

Attorney-general. Upon the facts ſtated, Mr. *French* is not a witneſs in point of law. He has been convicted, in one reſpect, for the very offence for which the priſoner ſtands indicted, though not in the ſame degree as the indictment ſets it forth, yet it is for the ſame fact. Upon this indictment Mr. *French* was tried, and was found guilty of manſlaughter, prayed the benefit of his clergy, which was allowed him, but he was *not* burned in the hand. Thus ſtands the caſe in fact. Now the allowance of clergy of itſelf does not diſcharge the party from the offence, ſo far as to ſet him *rectus in curia*, and make him in all reſpects a perſon fit to have the benefit and privileges of a *probus et legalis homo*, until he has paſſed through thoſe methods of ſetting himſelf right in the eye of the law, that the law hath deſcribed; and in order to ſet this matter in its true light, it will be neceſſary to open the nature of this *benefit of clergy*, and what advantage accrued to the party by having that benefit allowed him, and likewiſe what benefit he had by the ſtatute that enacted the *burning of the hand*, which was *ſtat.* 4 *Hen.* 7. *ca.* 13. *Law in Ireland, by* 10 *Hen.* 7.

By that act the burning in the hand was of no more effect but only to ſhew, that the priſoner had his clergy allowed him; and that, unleſs he were within orders, he ſhould have it no more than once. Before that act of parliament a perſon might have had the benefit of clergy ſeveral times, but that act limits it to once; and therefore in order to the having of it known, whether a man once had his clergy allowed him, who did not produce his orders, that act provides, there ſhall be a mark ſet upon him at the time of the allowance of this clergy, as a token that it was allowed him, and he was never to have it allowed afterwards; but even at that time he was to be delivered over to the ordinary to make his *purgation*. But ſince that act ſeveral ſtatutes have been made about this matter; as the ſtatute of *Edw.* 6. which enacts, that where a peer is convicted of felony within the benefit of clergy, he ſhall be diſcharged without being burned in the hand; but by *ſtat.* 18 *Eliz. ca.* 7. it is

enacted, that after the burning in the hand, the prisoner shall *not* be delivered to the ordinary, but shall be discharged; by virtue of which act, after burning in the hand, the prisoner hath made full satisfaction to the law, without that sort of purgation which was before requisite to be made; but until he be burned in the hand, or has his pardon, he is not to be discharged; it may be he may be bailed out by the judge, in order to get a pardon, but still he remains in *statu quo*, as to his being a witness, or any thing of that nature; his credit is gone until it be restored by the king's pardon, or his undergoing the punishment that the law requires; and no man would say, that where one lies under a conviction of felony undischarged by burning in the hand or pardon, that he can be a witness; he remains just as he was before, the conviction remains upon him which disabled him to be a witness, and that is the case of Mr. *French*.

Sir *Thomas Powis*, of counsel for the earl. Admitted the statute law to be as laid down; but observed that the statute of *Elizabeth* empowers the court that tried the criminal, not only to burn him in the hand, pursuant to the statute of *Hen.* 7. but also to detain him in prison for a year after; but, in his judgment, these statutes did not operate upon the restoration of his credit: for the burning in the hand, which is a mark of infamy, was never intended as a means, any more than imprisonment for a year, of restoring a man to his credit: it was only to shew he had his clergy once and should have it no more. The allowance of clergy, by the statute of *Elizabeth*, operates as a pardon; only, saith the statute, he shall not be delivered out of prison before he is burned in the hand, according to the statute of *Hen.* 7. No body can say that the continuing in prison for a year, which the court may order, though burned in the hand would, as to restoring of credit, have operated one way or other: but we insist, that the allowance of clergy sets him right in court, since purgation is abolished, and is the same thing as if he had undergone the ceremonial part of a formal purgation. It is the allowance of clergy that makes the operation or alteration in this case,

by

by virtue of the 18 *of Eliz.* for he is to have the ſame benefit of his clergy, as if he had been delivered to the ordinary, and purgation had been made; and now the allowance of clergy by this act, gives the ſame benefit to the party as purgation would have done before this act, and he is in the ſame ſtate and condition as he would have been in caſe of a purgation, or pardon by the king.

He then cited *Holcroft's caſe*, 4 *Co.* The defendant was indicted and convicted of manſlaughter, and he prayed the benefit of his clergy. The judges thought fit to reſpite their judgment therein; but his prayer was entered upon record, and then an appeal being brought againſt him, it came to be a queſtion how far he had his clergy: for by the *ſtat. Hen.* 7. an appeal will lie, notwithſtanding a conviction, if the party have not had his clergy; and in this caſe it was adjudged, that the party having prayed his clergy, he ſhould have the ſame benefit as if the court had ordered every thing to be actually executed, which ought thereupon to be done. Then it can be no queſtion, whether a man ſhall be a witneſs or no who has had his clergy allowed? it is ſo entered upon record, that the book was adminiſtered to him, and that he read as a clerk; for the party has done as much as he can, prayed the benefit of his clergy and had it allowed; and ſo it is entered upon record. The reſpiting the burning of the hand until the king's pardon be obtained, ſhall not ſure put him in a worſe condition than he would have been, if he had actually been burned in the hand.

In the caſe of *Searle*, v. *Williams*, lord HOBBART ſpeaks ſo fully to this matter, that it ought to end the queſtion. He ſays, the ſtatute of *Eliz.* appointing the burning in the hand without purgation, does operate as a ſtatute pardon to all intents and purpoſes, and the party having now the benefit of clergy allowed, is in all reſpects in the ſame condition as if he had been acquitted. Theſe are his words to that point: "Whoſoever ſpeaks words "of accuſation, reflecting upon a man for any offence, "for which he was indicted and convicted, and had his "clergy allowed, an action lies as if he had been to-"tally acquitted from it: it is not the burning in the "hand,

" hand, but the allowance of clergy that ſets him right " in his credit in the eye of the law, and he is thereby " in the ſame condition in that reſpect, that he would " have been if he never had had any conviction upon " him." Towards the end of the caſe, his very words are theſe: " Though the ſtatute ſaith, after burning in " the hand according to the ſtatute in that behalf made, " he ſhall be diſcharged, and if there is no burning in " the hand, that makes nothing; for though it be a caſe " where the hand ought to be burned, yet it is not ſo " eſſential but a man may have the benefit of the ſtatute, " though he be not burned; the king may pardon the " burning; for the burning even in an appeal, is no " part of the judgment, nor ſo much as in the nature of " puniſhment, but rather a mark to notify that he may " have his clergy but once." So that the ſtatute of *Eliz.* doth not aboliſh purgation, but gives the party all the benefit thereof, as if he had gone through it, and inſtead of delivering the party to the ordinary, to make his purgation, it ſays, he ſhall be delivered out of priſon; but leaſt it might ſeem to repeal the ſtatute of *Hen.* 7. as to the burning in the hand, being burned in the hand according to the ſtatute in that caſe provided: by the ſtatute of *Hen.* 7. he was firſt to be burned in the hand, and then delivered to the ordinary to make his purgation; but by the ſtatute of *Eliz.* he is firſt pardoned of his crime, by being allowed the benefit of his clergy, without making his purgation, and afterwards to be burned in the hand before he be delivered out of priſon; ſo that the burning in the hand is only a condition precedent to his getting out of priſon, not to his being reſtored to his credit. The king may pardon the burning in the hand, and in this caſe he has given a pardon as far as the privy ſeal, and that is ſufficient to ſhew his intention of pardoning throughout.

Hobbart is followed by *Hale*, who ſays, clergy gives a man capacity to purchaſe goods, and to retain the profits of his lands, and reſtores him to his credit, according to the caſe in *Hobbart*, of *Searle* and *William*. So here clergy reſtores the witneſs to credit.

Wright,

Wright, ſerjeant, in reply. Admitted that a pardon reſtores to credit; that allowance of the benefit of clergy, and burning in the hand upon it, amounts in law to, or is equivalent to a pardon; but here is neither actual pardon nor burning in the hand; and the benefit of clergy allowed is not ſufficient. There can be no pardon without the great ſeal; nor is clergy equivalent to pardon without burning in the hand.

In *Searle* and *Williams*, cited, it was not needful to burn the perſon convicted; he was a clerk in orders, and by law, exempt from burning in the hand, the *ſtat.* 18 *Eliz.* not requiring any perſon to be burned in the hand that was not before liable: and the moſt, *Hobbart* ſays, is, that in caſe where the hand ought to be burned, it is not eſſential; but the party may have the benefit of the ſtatute; that is, be diſcharged without burning; and the king may pardon the burning; and no doubt, if the king pardons the burning, it is as effectual as if the hand had been actually burned; for the king might pardon the whole and conſequently any part.

Hale, in his Pleas of the Crown, ſays expreſsly, that burning in the hand, is now ſince *ſtat.* 18 *Eliz.* the conſequent upon the allowance of clergy, which hath this effect: *Firſt*, it enables the judges to deliver him; *Secondly*, it reſtores him to former capacities: *Thirdly*, it reſtores him to his credit; and ſo it puts him in the ſame condition as if he were acquitted. What is it that hath this effect? the allowance of clergy and burning in the hand: there is not to be a delivery of the criminal until all be done which is required by law; and it was never yet pretended, that any perſon could have the full advantage of the benefit of clergy, ſince the ſtat. 4 *Hen.* 7. until he was burned in the hand, or the burning in the hand was pardoned. To apply this, Mr. *French* was convicted of felony and manſlaughter, and is neither burned in the hand nor pardoned, but he has prayed the benefit of the clergy, and has had the book given to him to try if he can read, and he certified he can read—but if the reading as a clerk, without burning in the hand or pardon of it, be not ſufficient in the law to intitle him to be diſcharged, why ſhould it be ſufficient to reſtore his

his credit? it is the whole together works the diſcharge and reſtores the party.

Burroughs, v. *Holcroft*, has been cited. There a man was convicted of manſlaughter and prayed his clergy; the court did not allow his clergy, but adviſed on it: this was held ſufficient to bar an appeal, for if clergy had been allowed, it had clearly been a good bar; and the act of the court in adviſing upon the prayer, and not allowing clergy where it ought to be, ſhall not prejudice the party convicted, but he ſhall be in the ſame ſtate as if clergy had been actually allowed: but here it is not pretended that Mr. *French* deſired to be burned in the hand, but that was reſpited in favour to him, with intention that he ſhould get the king's pardon for the burning, which is not yet obtained, and conſequently he is not intitled to that benefit which the law would give him, if he was either pardoned or burned in the hand; he is not fully diſcharged of the conviction, and therefore ought not to be admitted as a witneſs.

The JUDGES being called on for their opinion—

TREBY, C. J. ſaid, there could be no doubt, but a peer convicted of clergyable felony, would be competent without burning in the hand. Here is no pardon, but preparation for one, ſo theſe two points are out of the queſtion. The queſtion is, whether this commoner, being convicted of felony, and having his clergy allowed, but being unburned and unpardoned, ſhall be received and be allowed to be a witneſs—

I am of opinion he ought not—

For, whatever quality or credit he might perſonally be of, he is by being and remaining a felon convict rendered *infamous* in the eye of the law. Upon the conviction he loſt, by the intendment of law, that credit which is neceſſary to a witneſs; and is not reſtored to it by the bare allowing of clergy; but is in the ſtate as a felon convict would have been before purgation at common law.

The chief juſtice then ſtated hiſtorically and minutely the common and the ſtatute law, reſpecting benefit of clergy, the incapacities it created, and the law of purgation by which the party was reſtored to his liberty, his goods, his chattles, the profits of his lands, and his credit

credit as a witneſs or juror, all of which he forfeited by conviction, but was reſtored to by purgation and abſolution.

He denied that the allowance of clergy, by virtue of *ſtat. Hen. 7.* frees a man and makes him *rectus in curia*, as if he had made his purgation, or that by the ſtatute he was firſt pardoned of his crime, by being allowed the benefit of clergy. He critically examined the ſtatute of *Henry 7. Holcroft's* caſe, which he conſidered inapplicable, and *Searle* and *Williams*, which in his judgment confirmed this, that where a convict is liable to be burned in the hand, he is not reſtored and diſcharged without it; becauſe the ſtatute ſays, "*after* burning," but from henceforth the ſtatute frees him from all future puniſhment: but *Hobbart* ſaith, that where he is not liable to burning, he ſhall have the ſaid benefit immediately upon the allowance of clergy only. So it was in the caſe of *Searle* and *Williams*, for *Searle* was a clerk in orders, parſon of *Heyden-German*, in *Eſſex*, and convicted of manſlaughter. So it is, ſays the reporter, where the king pardons the burning. And the laſt words in the caſe clearly ſhews his meaning, *viz.* where the ſtatute ſays, "after burning," it imports where burning ought to be.

"To me the law is evident. A peer ſhall have this "benefit without either clergy or burning. A clerk in "orders, on clergy alone, without burning. A lay "clerk, not without both."

Hale has been cited, he plainly declares the ſame opinion, and cites the laſt mentioned caſe in proof of it. His words are theſe: "What is the effect of clergy "allowed? in antient time the conſequence was, deli"very to the ordinary, either to make purgation, or "*ſine purgatione*, as the caſe required. But by *ſtat.* "18 *Eliz. ca.* 7. now only burned in the hand, which "hath theſe effects: *Firſt*, it enables the judge to deli"ver him out of priſon: *Secondly*, it gives him capacity "to purchaſe goods, and retain the profits of his lands: "*Thirdly*, reſtores him to credit." *Searle's caſe. Hob.* 289, 291. *Foxley's caſe*, 5 *Co.*

The

The two books which this learned judge *(Hale)* cites, are full authorities, that it is this burning which enables the court to deliver him, and that that delivering which is then due to him, is, by good conſtruction, in lieu of pardon, which reſtores him to his ſaid capacity and credit.

To conclude. This condition precedent (burning in the hand) upon which the reſtitution of the witneſſes credit depends, is not performed by his undergoing the ſaid puniſhment, nor diſcharged by the king's pardoning it, and therefore he is not a legal witneſs. All the other judges concurred, and the evidence of Mr. *French* was rejected. 5 *St. Tr.* 166 *to* 174.

Rule the Second.

The *king's pardon* for burning in the hand, on a conviction of manſlaughter, has the ſame effect in reſtoring the convict to competency and credit, as burning in the hand would have had; which it is agreed has, without a pardon, the power of taking away all incapacities incidental to the conviction.

For the effect of ſuch pardon by the king, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence, for which he obtains his pardon; and not ſo much to reſtore his former, as to give him a new credit and capacity. 4 *Blackſ. Comm.* 395.

So in the KING, *v.* AMBROSE ROOKWOOD, at a *ſeſſions of oyer and terminer*, for the county of *Middleſex*, ſitting in the *king's-bench*, *Weſtminſter*, *April* 8, *Will.* 3, 1696, on an indictment for high treaſon.

Captain *Porter*, who was produced as a witneſs for the crown, as appeared by the record, which was read in court, had been tried for murder the 36 *Car.* 2, was acquitted of the murder, but found guilty of manſlaughter; had not been burned in the hand, but had pleaded the king's pardon: and ſeveral parliamentary acts of pardon had paſſed after.

Sir *Bartholomew Shower*, and Mr. *Phipps*, of counſel for the priſoner, ſubmitted, that a man convicted of manſlaughter

manſlaughter and pardoned by the king, ſtill remains unqualified to be a witneſs. And they cited lord *Caſtlemain*'s caſe, to ſhew that burning in the hand was eſſential, and alſo a caſe in 1 *Brownlow*, to ſhew that a man attainted of felony, though pardoned, cannot be of an inqueſt, and conſequently cannot be a witneſs, for the one ſhould ſtand as clear and unſuſpected in his probity and veracity as the other, they being both ſworn, he to give evidence, the other to determine upon oath: and, as lord *Coke* ſays, if a man be convicted of felony and pardoned, he cannot be a juryman, for though puniſhment be pardoned, the guilt remains, ſo that he is not *probus et legalis homo*; and every particular perſon has an intereſt in it, that they have clear and free perſons to be jurymen and witneſſes. Lord *Caſtlemain*'s caſe. 3 *St. Tr.* 36. *Brownl.* 47. *Bulſt.* 154.

By the 11 *Hen.* 4. a man attainted cannot be a juryman, though pardoned by the king: it was objected in that caſe that he might be a witneſs, but *Jones*, juſtice, ſaid it was the ſame reaſon, if he be not fit for a juryman, he is not fit for a witneſs; they ought to be both *probi et legales homines*. *Bulſtrode* is the ſame; it was in the caſe of a prohibition for a *modus decimandi*, where the ſuggeſtion is to be proved by two witneſſes, it was objected, it was not proved by two witneſſes, becauſe they were both *attainted* of felony, and though they were pardoned, yet that did not make them good witneſſes in the opinion of the court.

HOLT, C. J. This is quite another caſe, it does not come to your points. Here is pardon upon pardon, by act of parliament.

Shower and *Phipps*. The parliament pardon is out of the caſe: for if the pardon from the king be a good pardon, there is no guilt for the act of pardon to work upon. We ſay this, a man that is actually pardoned the puniſhment by the king's pardon, and afterwards an act of pardon comes and pardons all offences, does nothing; for the man is not a ſubject of pardon, having been diſcharged of his puniſhment before. He is not an offender within the meaning of the act of parliament; there-

fore it works nothing as to him, and he ſtands as much diſabled from being a witneſs as before.

HOLT, C. J. Thoſe caſes put are no authorities in this matter, for where there is a conviction of manſlaughter, and the party is pardoned, that pardon of the king works in the way of diſcharge as much as the burning in the hand. It is the ſame thing. It is admitted *that* will diſcharge him to all intents and purpoſes, and ſo does *this* as effectually, for having his clergy, and being burned in the hand, works by way of ſtatute pardon. The caſe of a juryman is not the ſame with this caſe; but even in that caſe the party convicted after the king has pardoned him, is not diſabled from being of a jury; but ſuppoſing that to be ſo, there are many caſes where a man may be a witneſs who cannot be a juryman. It is true, the *credit* of ſuch a witneſs is left to the jury, but it is no objection againſt his being a legal witneſs; and it is a ſtrange thing that becauſe he was pardoned by the king, if that were deficient, that therefore the act of pardon ſhould have no effect. Truly that is to ſay, that the king's pardon works ſo as to have nothing left for the parliament's pardon to work upon; and certainly the king's pardon ſets him ſo right, that to all intents and purpoſes, he is as good a witneſs as ever he was; and if any thing remained to be done, the act of parliament has done it, and ſupplied the defect; but the king's pardon is ſufficient.

The *attorney* and *ſolicitor-general*, for the crown, cited the caſe of the lord *Caſtlemain*, wherein *Dangerfield*, who had been burned in the hand for a felony, was held to be a legal witneſs; and to the ſame point the opinion of *Roll. Stiles* 388. And *Croſby*'s caſe, in which *Aaron Smith* was produced as a witneſs, and the priſoner objected to his competency, becauſe he had ſtood in the pillory, but the court ſaid, the act of pardon did reſtore him to all intents and purpoſes, *ad literam legis*. *Ante* .

HOLT, C. J. In *Aaron Hill*'s caſe the court did not decide upon the infamy of the offence, but went upon the pardon. Why the very parliamentary pardon comes from the king; the king has a full power of pardoning

and

and where he does pardon under the great ſeal, it has the full effect of the parliamentary pardon. A pardon before attainder prevents all corruption of blood; ſo that though a man forfeits his goods by conviction, yet, after a pardon, he is capable of having new goods, and ſhall hold them without any forfeiture whatſoever: for the pardon reſtores him to his former capacity, and prevents any further forfeiture. Indeed, if he had been attainted, whereby his blood was corrupted, no pardon, whether it were by the king or by the parliament, could purge his blood without the reverſal of the attainder, by writ of error or act of parliament, or expreſs words in the act to reſtore blood; either ſpecies of pardon makes him a new creature, gives him new capacity, and makes him to all intents and purpoſes, from the time of the pardon to be *probus et legalis homo*, and a good witneſs. Indeed, this crime might be objected againſt his *credit*; but it is not to be urged againſt the ſufficiency of his evidence; that is his being a witneſs—captain *Porter* was ſworn and examined. 4 *St. Tr.* 642. Vide the earl of *Warwick*'s caſe. *Ante* . *Poſt*

Rule the Third.

The legiſlature of England, taking into conſideration, as the ſtatute expreſſes it, that the puniſhment of burning in the hand perſons convicted of felony, within benefit of clergy, is often diſregarded and ineffectual, and may fix an everlaſting mark of diſgrace and infamy on offenders, who otherwiſe might become good ſubjects; hath enacted, that any perſon liable to ſuch burning, may be puniſhed by a moderate fine, at the diſcretion of the court, except in caſes of manſlaughter, or by a public or private whipping, not more than three times, and in the caſe of female offenders in the preſence of females only; and that ſuch fine or whipping ſhall have the like effect and conſequences to the party, with reſpect to diſcharge or reſtitution to *capacity* and *credit*, &c. as if the burning had been inflicted. *Stat.* 29 *Geo.* 3. *ca.* 74. *ſect.* 3. 1779.

At

At common law, a perſon indicted of petit-larceny not being liable to be burned in the hand, was diſqualified from being a witneſs, although the puniſhment of the ſentence adjudged was inflicted. The KING, *v.* M'KINDER. 2 *Wilſ.* 18.

Rule the Fourth.

But now, by *ſtatute*, it is enacted, that a conviction of petit-larceny, ſhall not incapacitate the party convicted from being a witneſs. *Stat.* 31 *Geo.* 3. *ca.* 35. *Iriſh* 36 *Geo.* 3. *ca.* 9.

Rule the Fifth.

But a pardon from the king has no manner of force, as to the purpoſe of reſtoring capacities or competency to the convict, unleſs it hath paſſed the great ſeal: therefore where the objection is made to competency, by producing the record of conviction, the production of the pardon with the great ſeal annexed, is neceſſary evidence to rebut ſuch objection. 2 *Hawk. P. C. ca.* 37.

So in the earl of WARWICK's caſe, before the lords, 12 *Will.* 3. before cited; a man was called as a witneſs, who had been convicted of felony, within the benefit of clergy, and had prayed his clergy, and it is allowed, but the burning of the hand is reſpited, and a warrant under the privy ſeal was made out for his pardon; yet the judges held, that he could not be a witneſs until his pardon had paſſed the *great ſeal*, and that he had produced it and pleaded it, *ſub pede ſigilli*. 5 *St. Tr.* 166. *Ante* . . *Poſt* . *Murphy's caſe*.

And in M'DONALD, *v.* RAMSAY, *Trinity* 21 & 22 *Geo.* 2. 1748. *Ban. Reg.* The priſoner had been convicted of high treaſon, 1747: but his majeſty had given orders for preparing a pardon for him, on condition of his continuing abroad for life. On motion to diſcharge him from arreſt in a civil ſuit: the COURT ſaid, we cannot take notice of his majeſty's *intentions* touching the pardon. The crown in caſes of pardon, ſignifieth its pleaſure finally and irrevocably by the great ſeal, and by that

that alone. A pardon may not pass at all; or it may upon other conditions than those suggested from the bar, or it may be a free pardon. *Post.* 62. 1 *Wilf.* 217. *S. C. Leach. Cr. Ca.* 3 *Edit.* 117. *Post* . *Murphy's case.*

And in the KING, *v.* PATRICK MURPHY, and others, *Old-Bailey, July session,* 1773. The defendants were indicted before WILLES, J. and GLYNN, serjeant and recorder, for a highway-robbery.

Silvester, counsel for the prisoner, objected to the competency of the principal witness, *William Gully,* upon the ground of his being a convict under sentence of death; in evidence of which he produced the record of his conviction; and a witness to identify his person.

Lucas, for the crown, produced the *king's sign manual,* under which the prisoner had been discharged, on his giving security to appear and plead the next general pardon that should come out.

The COURT held the objection incontrovertible; for nothing less than a pardon, under the great seal, can restore the competency of the witness, and it was impossible for the court judicially, to take notice of his majesty's intention, to pardon which is the extent of what the sign manual has signified. The JUDGES determined, in the case of the earl of *Warwick,* that if a man be convicted of felony, that is within clergy, and prays his clergy, and it is allowed, but the burning in the hand is respited, he cannot be a witness until his pardon has passed the great seal, and he has produced and pleaded it *sub pede sigilli;* for as it is for his benefit, it is presumed to be in his custody, and it would be error to grant him the benefit of it until it has been allowed: but letters under the *king's sign manual* cannot be pleaded as a pardon. *Leach Cr. Ca.* 3 *Edit.* 115, 116. 3 *Stamf.* 103. 2 *Hawk. Pl. Cr.* 6 *Edit.* 558. *Ante*

Rule the Sixth.

The king's pardon for treason or felony, after a conviction or attainder, restores the party to his competency.

And

And does so far clear the party convicted or attainted of the infamy and all the consequences of his crime, that he may not only have an action for a scandal, in calling him a traitor or a felon, after the time of the pardon, but may also be a *good witness*: because the pardon makes him as it were a new man, and gives him a *new* capacity and credit. 2 *Hawk. Pl. Cr. ca.* 37. *and ca.* 46.

HALE, to the same point says, if the king pardon these offenders, they are thereby rendered competent witnesses, though their credit is still left to the jury, for the king's pardon takes away *pœnam et culpam in foro humano*, but yet it makes not the man an honest man, and therefore he shall not be a juryman, but yet he may be a witness, contrary to the opinion of *Coke*. 2 *Hale* 278. *Hob.* 67, 81. *Bulst.* 156.

On this rule, in CROSBY'S case, HOLT, C. J. makes this distinction. Where there is a conviction for a criminal offence, the king cannot restore the party to his credit, but gives him credit for the future. 5 *Mod.* 15. *Ante*

In the KING, *v.* THOMAS REILLY, *Old-Bailey, July sessions*, 1787. In this case it appeared, that *John M'Daniel* had been convicted on *stat.* 31 *Geo.* 2. *ca.* 10. which makes it felony without benefit of clergy, to take a false oath, or procure any other person to take a false oath, to obtain the probate of any will, or letter of administration, in order to receive officers or seamen's wages, pay, prize-money, &c.

In the course of the trial of *John M'Daniel*, it was discovered that *Thomas Reilly*, who appeared as a witness, had suborned the prisoner to commit the offence; and he was committed to take his trial; and no judgment was passed upon the prisoner.

Shepherd and *Garrow*, counsel for the prisoner, produced the record of *M'Daniel*'s conviction, and submitted, that his competency was thereby destroyed, notwithstanding the conviction had not yet been followed by a judgment.

Silvester and *Fielding* for the crown, waved the argument upon this point: and *M'Daniel* being called upon

to

to ſay why judgment and execution ſhould not be awarded againſt him, pleaded his majeſty's pardon, in bar, which was allowed.

The queſtion therefore was, whether a ſpecial pardon, granted after conviction on this *ſtatute*, but pleaded and allowed in bar of the judgment, reſtored the witneſs to competency; or whether it only remitted him from the puniſhment to which he would have been liable in conſequence of an attainder.

For the priſoner it was contended, that as a pardon, by the particular manner in which it is penned, merely imports an intention on the part of the king, to diſcharge the party from future puniſhment, it was to be conſidered as a *charter of remiſſion only*, and could not, by conſequence and deduction, be conſidered as a *charter of reſtoration*, ſo as to remove the diſability to which the witneſs had once been rendered liable, and enable him thereby to prejudice the intereſts of third perſons, by giving evidence againſt them.

The counſel for the crown anſwered, that the king's pardon not only remits the puniſhment, but reſtores the convict to his *plenam et liberam legem*. And they relied on 2 *Hale Pl. Cr.* 278. 2 *Hawk. Pl. Cr. ca.* 33. *ſect.* 132.

The COURT were decided, that in caſes of felony, a pardon from the crown reſtores the competency of the convict; and that the verdict againſt *M'Daniel* was to be conſidered as a conviction of a felony committed through the medium of perjury, and not as *perjury* itſelf.

The evidence of *M'Daniel* was accordingly received, and the jury found the priſoner *Reilly* guilty: but judgment was reſpited for the opinion of the judges.

WILSON, J. in June ſeſſion, 1788, informed the priſoner, that the JUDGES were of opinion, that if *M'Daniel* had not received his majeſty's pardon, ſome doubt might have been entertained, but that as he was pardoned, and that pardon regularly allowed, they are clear that it not only reſpites the convict from puniſhment, but entirely abſolves him from the crime, and reſtores him completely to his former competency and credit.

The caſe of *Cuddenſton*, v. *Wilkins*, is preciſely in point, and deciſive of the queſtion; for it is there expreſsly determined, that the king's pardon doth not only clear the offence itſelf, but all the dependencies, penalties, and *diſabilities*, incident to it. The JUDGES therefore are of opinion, that the teſtimony of *M'Daniel* was properly admitted in evidence, and that *Thomas Reilly*, the priſoner at the bar, has been legally convicted on this indictment. The priſoner received ſentence of death. *Leach Cr. Ca.* 2 *Edit.* 361. 3 *Edit.* 512. *Hob.* 67, 82.

The above caſe ſeems concluſively to ſettle the queſtion, whether the king's pardon generally, reſtores the competency of the convicted party: heretofore ſome held, that the king's pardon takes away the puniſhment indeed, but doth not remove the crime, and that the turpitude of the crime remaining, is ever a preſumption againſt his evidence. 2 *Brownl.* 47. 2 *Bulſt.* 154. 2 *Sid.* 221. 2 *Danv. Abr.* 163. *pl.* 6. *Cro. Jac.* 622. 2 *St. Tr.* 521. 4 *St. Tr.* 269. *Lord Caſtlemain's ca.* 3 *St. Tr.* 46, 47. *Ante*

Others, however, and among thoſe GILBERT, C. B. and ſerjeant HAWKINS, whoſe opinion joined with that of HALE, conſtitute an authority irreſiſtible, hold that the king's pardon reſtores the reputation; and the loſs of reputation being part of the puniſhment, the king's pardon that can take off the whole puniſhment, muſt by neceſſary conſequence, reſtore reputation; and that the king, as conſtitutional guardian of the life, liberty, and eſtate of his ſubjects, is the beſt judge of the conſequence of his pardon. 2 *St. Tr.* 269. 3 *St. Tr.* 585, 610, 552, 553. 4 *St. Tr.* 610. *Gilb. Evid. by Loft*, 260.

So that if any perſon guilty of theſe crimes by which the credit is loſt, be afterwards pardoned, it muſt be ſuppoſed he hath repented of his fault and hath returned to a better mind, and therefore that his evidence is not dangerous to the life, liberty, or eſtate of the ſubject. *Ibid.* 2 *Hawk. Pl. Cr. ca.* 37.

But, as has been repeatedly ſaid, though a man convicted of an infamous crime be re-admitted to *competency*, by the royal pardon, a jury, doubtleſs, will exerciſe their diſcretion

diſcretion as to the *credit* due to him under theſe circumſtances, according to the nature of the offence of which he was pardoned.

Rule the Seventh.

But though the king's pardon will remove a man's diſability to be a witneſs, in all caſes whatſoever, wherein ſuch diſability is only the conſequence of the conviction or judgment againſt him; yet ſuch diſability is *not* removed by the royal pardon, where it is an *expreſs part of the judgment*; as it is in conſpiracy at the ſuit of the king, and in perjury on the ſtatute. 2 *Hawk. Pl. Cr. ca.* 46.

HAWKINS reſts the above diſtinction on the opinion of HOLT, C. J. in the *King*, v. *Croſby*; in which caſe the chief juſtice is reported to have ſaid, in the *King*, v. *Wicden Ford*, the queſtion being, where the king could pardon a diſability, and where not: HOLT, C. J. took this difference, *viz.* where the diſability is only the conſequence of the judgment, the king may pardon it, but where the diſability is part of the judgment itſelf, the king's pardon will not take it away. Therefore if a man be convicted of perjury on the ſtatute, the king's pardon will not reſtore, for it is not a conſequence but part of the judgment, *viz. Quod impoſterum non ſit receptus ad teſtis.* *Co. Entr.* 300. 2 *Salk.* 689. *Ante* .

As in the KING, v. GRIEPE, *Mich.* 9 *Will.* 3. *at bar*, *Banc. Reg.* On an information for perjury: and it was objected, that this information is for perjury at common law, which is puniſhable, though it be not corrupt or material to the iſſue, or prejudicial to any.

The COURT anſwered, that the ſtatute only inflicts a greater puniſhment, but does not alter the nature of the offence. And,

HOLT, C. J. ſaid, that perjury at common law was an infamous crime, and the ſtatute 11 *Hen.* 7. *ca.* 25. ſuppoſes ſo. And in the *Mirror of Juſtices*, *tit. infamy*, perjury is mentioned. So *Forteſcue de Laud. Angl.* There is no reaſon therefore for any diverſity in the crimes upon ſtatute or at common law; but the puniſhments are

different, for in convictions upon the ſtatute, *diſability* is part of the judgment, but at common law it is only a conſequence, and therefore, at common law, the king may pardon and reſtore the convict to his competency, but upon the ſtatute he *cannot*: but he muſt reverſe the judgment or he cannot be reſtored. 1 *Ld. Raym.* 256. *S. C.* 12 *Mod.* 139. *Comb.* 459. 2 *Salk.* 512. *Carth.* 421. *Holt.* 535. *Comy. Rep.* 43. 5 *Mod.* 343. 3 *Mod.* 342.

Therefore the courts of law now hold, that on perjury at common law, the party pardoned may be a witneſs, becauſe the king has power to take off every part of the penalty, and this effectually comprizes a power to diſcern whether it is proper that the offender ſhould be reſtored to credibility: but if a man be indicted for perjury on the ſtatute, the king cannot pardon ſo as to diſcharge his incompetency: for the king is excluded and diveſted of that prerogative by the expreſs words of the ſtatute, which are theſe: "the oath of ſuch perſon ſo "offending, is not to be received in any court of re-"cord," or as the ſtatute elſewhere expreſſes it, "the "offender from thenceforth to be diſcredited, and diſ-"abled for ever to be ſworn in any court of record." *Engl. ſtat.* 5 *Eliz. ca.* 9. *Iriſh ſtat.* 28 *Eliz. ca.* 2. *ſect.* 1. *Gilb. La. Evid. by Loft*, 260.

Rule the Eighth.

In every pardon under the great ſeal, the capacities of the convict are reſtored immediately on the pardon being recorded; and if the pardon be conditional, then in like manner after the performance of the condition, the *competency* of the party to be heard as a witneſs is *reſtored*, or legally created. *Gilb. La. of Evid. by Loft*, 259.

Rule the Ninth.

By a ſtatute pardon every one within that pardon is reſtored to *competency*, and is to be conſidered as received into ſociety as a perſon of credit; for no man can be

puniſhed

puniſhed in his reputation, when the public voice hath diſcharged him from his offences. *Gilb. La. of Evid.* 259.

And therefore, as has been ſtated, the convict, after pardon, may have an action of ſcandal againſt any perſon accuſing him of the crime for which he was convicted. *Ante*

Rule the Tenth.

The certificate of the clerk of the crown, peace, or aſſizes, of a defendant having had the benefit of clergy, or of the ſtatute, is evidence thereof on a ſubſequent indictment. *Iriſh ſtat.* 9 *Will.* 3. *ca.* 7. *ſect.* 7. *and* 9 *Ann. ca.* 6. *ſect.* 5. 5 *Stat. at large*, 262.

CHAPTER XX.

On the Competency of Judges and Jurors.

Rule the Firſt.

It is no exception to a perſon giving evidence either for or againſt a priſoner on his trial, that he is one of the *judges* or *jurors*. 2 *Hawk. P. C. ca.* 46. 7 *Edit. p.* 608.

And on the trial of the REGICIDES, *Old-Bailey*, *December*, 12 *Car.* 2. *Anno* 1660, ſecretary *Morris*, and Mr. *Anneſley*, preſident of the council, were both in commiſſion for the trial of the priſoners, and ſat upon the bench; but there being occaſion to make uſe of their teſtimony againſt *Hacker*, one of the priſoners, they both came off from the bench and were ſworn, and gave evidence, and did not go up to the bench again during that man's trial. And it was agreed by the court, they were good witneſſes, though in commiſſion, and might be made uſe of. 2 *Hawk. P. C. ca.* 46. *Kelyng* 12. 1 *Siderf.* 133. 2 *St. Tr.* 384.

Rule the Second.

Judges who have ſat on one trial, may be called upon as witneſſes for a defendant on a ſubſequent trial, for though a judge cannot take notice of any thing not proved, he may and ought to be a witneſs, if he knows any thing material of the matter tried before him and others. 4 *St. Tr.* 85, 202.

So in the KING, *v.* TITUS OATES, *Eaſter*, 1 *Jac.* 2. 1685. *B. R.* The defendant, on his trial for perjury, called on MONTAGUE, C. B. who had ſat as a commiſſioner of *Oyer and Terminer*, at the *Old-Bailey*, on the trials of *Ireland*, *Whitebread* and *Langhorn*, to give teſtimony, that the judges on thoſe trials had received ſatisfaction from the fulneſs and fairneſs of the evidence then delivered. 4 *St. Tr.* 40.

So in lady IVY's caſe, *Trinity*, 36 *Car.* 2. *B. R.* before JEFFERIES, C. J. Mr. Baron *Gregory* was called on as a witneſs, to prove his peruſal of certain deeds where he was counſel. 7 *St. Tr.* 580, 597.

And in the KING, *v.* PETER FINERTY, at a commiſſion of *Oyer* and *Terminer*, &c. for the city of *Dublin*, *December*, 38 *Geo.* 3. before DOWNES, J. The defendant was tried for a libel upon government, and lord YELVERTON, C. B. called by him as a witneſs, was ſworn and examined, not only to his hand writing at the foot of ſome affidavits, but to facts reſpecting a recommendation from the jury, who were impanelled on the trial of *William Orr*, who had been tried and convicted before his lordſhip of a capital felony, in adminiſtering the oath of an united Iriſhman. His lordſhip gave his evidence on the table. *Finerty's Trial by Ridgeway*, 51. *M. S. note.*

Rule the Third.

Jurors may be examined not only to the character of priſoners, but to facts in the cauſe; but they muſt be ſworn as other witneſſes are; and they muſt give their evidence in open court, in the uſual way.

CHAPTER

CHAPTER XXI.

Of the obligation on Counſel, Attornies, Solicitors, and Agents, to keep ſecret the communications of their Client, reſpecting the Suits in which they are retained: and of the privilege claimed by perſons of other deſcriptions, not to diſcloſe in evidence ſecrets communicated to them.

Rule the Firſt.

NEITHER counſel, nor attornies, ought to be permitted to diſcover the ſecrets of their clients, though they offer themſelves as witneſſes for that purpoſe.

This is the privilege of the *client*, and not of the counſel or attorney; and it is founded on the policy of the law, which will not permit any perſon to betray a ſecret with which the *law* hath entruſted him. *Bul. N. P.* 284.

But the general rule ſeems derived from hence. That formerly, in the ſimpler ſtate of ſociety and laws, perſons appeared for themſelves, and conducted their own claims and defences, without needing the aſſiſtance of men educated to the formal practice of the law. When the extenſion of property, the increaſe of laws, the magnitude, number, and ſubtilty of legal queſtions, rendered this no longer ſafe or practicable, the attorney, as the name indicates, became the legal repreſentative of his client in the cauſe. The anſwer of the agent was the anſwer of the principal; and whatever the party could have done perſonally was concluſive, when tranſacted in his place by his legal proxy. It was therefore converſely juſt, that the attorney ſhould neither be compelled nor permitted to anſwer queſtions pointed at the diſcloſure of facts, which to divulge, would be inconſiſtent with the nature of ſuch repreſentation, being of that kind which the party could not have been obliged to anſwer. *Reading on the ſtatutes, Geo.* 2. *by Rayner* 111.

Rayner is not the firſt lawyer who has derived the rule of profeſſional confidence, from the nature of profeſſional

feſſional ſituations. In ANNESLEY, *v.* the earl of ANGLESEY, *Exchequer, Ireland, at bar*, the RECORDER of Dublin, arguing for the defendant, ſays, formerly ſuitors appeared in court themſelves, but as buſineſs multiplied and became more intricate, and titles more perplexed, both the diſtance of places and encreaſe of buſineſs, made it abſolutely neceſſary that there ſhould be a ſet of people, who ſhould ſtand in the place of the ſuitors, and theſe perſons are called attornies. Since this has been thought neceſſary, all people, and all courts, have looked upon ſuch confidence between the party and attorney to be ſo great, that it would be deſtructive to all buſineſs if attornies were to diſcloſe the ſecrets of their clients. 9 *St. Tr.* 387.

So in the KING, *v.* WATKINSON, *Mich.* 13 *Geo.* 2. *Niſi Prius*, indictment for perjury in an anſwer in chancery. The maſter who took the anſwer was called, but could not identify the perſon. The proſecutor inſiſted upon examining the *defendant's ſolicitor*, who was preſent at putting in the anſwer, and had been ſubpœnaed; but he inſiſting on his privilege, the chief juſtice would not compel him to be ſworn, ſo the defendant was acquitted. 2 *Stra.* 1122.

☞ The Reporter put a query upon this deciſion, the evidence required being a fact in the *knowledge* of the ſolicitor, and no matter of ſecrecy communicated to him by his client. Vide *Poſt*, rule 5.

Rule the Second.

The general rule above laid down, is confined to ſuch facts as have been communicated by the client to his counſel, attorney, or ſolicitor, reſpectively, in giving profeſſional inſtructions in the cauſe in which they are retained; for the counſel, or attorney, may be examined to a fact of their own knowledge, which they might have known without being counſel or attorney in the cauſe. *Bull. N. P.* 284.

As in lord SAY and SEAL's caſe, *Mich.* 10 *Anne, B. R.* Ejectment at bar, to prove a recovery good, a deed directing the uſes of the recovery and the fine, to wit, the

the chirograph of the fine and common recovery were produced. And lord *Say* and *Seal*'s counſel deſired to call one *Knight*, an attorney at law, to prove, that though the deed was dated October the twenty-third, it was not executed until five months after, to wit, in March.

The attorney was the perſon intruſted in ſuffering the common recovery.

The counſel for the heirs at law objected: becauſe as an attorney has a privilege not to be examined as to the ſecrets of his client's cauſe; ſo, the attorney's privilege was likewiſe the client's privilege; for the client inſtructs the attorney with the ſecrets of his cauſe upon confidence, not only that he *will* not, but alſo that though he *would*, yet that he *ſhould* not be admitted by the law to betray his client, and for this *Holbeach*'s caſe was relied on.

The court were of opinion, that *Holbeach*'s caſe was good law; and that an attorney's privilege was the privilege of his client; and that an attorney though he *would*, yet *ſhould* not be allowed to diſcover the ſecrets of his client: But notwithſtanding this, they thought *Knight*'s evidence was to be received; for that a thing of ſuch a nature as the time of executing a deed, could not be called the ſecret of his client; that it was a thing he might come to the knowledge of without his client's acquainting him, and was of that nature, that an attorney concerned, or any body elſe, might inform the court of. *Knight* was ſworn. 10 *Mod.* 40.

So in ANNESLEY, *v.* the earl of ANGLESEY, *Mich.* 16 *Geo.* 2. 1743, *at bar*, in the *exchequer of Ireland*.

Ejectment. A queſtion aroſe, whether *John Giffard*, an attorney, who had been twenty years profeſſionally employed by the earl of *Angleſey*, ſhould be permitted to give in evidence, a *converſation* which he had with that nobleman, reſpecting a proſecution againſt Mr. *Anneſley*, for murder; from whence it would appear, that the earl of *Angleſey* privately took an active part to proſecute him to conviction, in order that he might be hanged, and the earl thereby be freed from his claims to the eſtate, for which the ejectment was brought.

To this it was objected, that the witneſs having been attorney to the earl of *Angleſey*, he was to keep the ſecrets of his client, and ought not to be permitted to diſcloſe them, and, as authorities in point, there were cited *Crofts*, v. *Pickering*. 1 *Vent.* 197. And *lord Say and Seal's caſe*. *Ante*

After this queſtion had been moſt learnedly and elaborately argued, the COURT determined to the following effect.

BOWES, C. B. (afterwards chancellor) ſaid, the public are intereſted in the event of this queſtion, ſo far as it may affect the neceſſary confidence between the client and his attorney or agent; and caution ſhould be uſed in fixing bounds to that truſt. The proper way will be, to determine this and every like caſe, upon their own circumſtances. What has been urged to take the preſent caſe out of the general rule was, that the converſation to which the plaintiff's counſel would examine Mr. *Giffard*, was neither in any cauſe wherein he was concerned for the defendant, or relative to any in which he was conſulted, or intended to be employed by the defendant. If ſo, the queſtion will be—"Whether an attorney "ſhall be permitted to diſcloſe the general converſation "he had with his client, without relation to him as his "attorney?" Now, admitting the policy of the law, in protecting ſecrets diſcloſed by the client to his attorney, to be as has been ſaid, in favour of the client, and principally for his ſervice, and that the attorney is *in loco* of the client, and therefore his truſtee, does it follow from thence, that every thing ſaid by a client to his attorney falls under the ſame reaſon? I own I think not; becauſe there is not the ſame neceſſity upon the client to truſt him in one caſe as in the other, and this the court may judge from the particulars of the converſation. Nor do I ſee any impropriety in ſuppoſing the ſame perſon to be intereſted in one caſe as an attorney and agent, and in another as a common acquaintance. In the firſt caſe, the court will not permit him, though willing to diſcover what came to his knowledge as an attorney, becauſe it would be in breach of that truſt, which the law ſuppoſes to be neceſſary between him and his employer: but

but where the client talks to him at large as a friend, and not in the way of his profeſſion, the court is not under the ſame obligations to guard ſuch ſecrets, though in the breaſt of an attorney.

The caſe of *Cutts* and *Pickering* reſtrains profeſſional confidence to what came to the attorney's knowledge as attorney; and ſo is the caſe of lord *Say* and *Seal*: the evidence to which the attorney was there produced being to the defective execution of a deed, to make a tenant to the *præcipe* for ſuffering a recovery, in which the witneſs had been employed as attorney, which was the ſecret of his client's cauſe. I found my opinion upon the nature of the teſtimony propoſed, which appears to have been caſual converſation between the witneſs and the earl of *Angleſey*, not neceſſary to have been communicated by his lordſhip: and as to the private truſts between man and man the court cannot interpoſe. I therefore think the witneſs may be examined to the defendant's declarations. 1 *Ventr.* 179. *Ante* 242.

Mounteney, B. was of opinion, that the evidence ought to be received, and that upon the very principles laid down, and the authorities of the caſes cited by the defendant's counſel. He admitted, that attornies ought to keep inviolably the ſecrets of their clients, and that for the reaſons offered by the recorder of Dublin. That is to ſay, that an increaſe of legal buſineſs, and the incapacity of parties to tranſact that buſineſs themſelves, made it neceſſary for them to employ (and as the law properly expreſſes it, *preponere in loco ſuo*) other perſons who might tranſact that buſineſs for them. This neceſſity introduced with it the neceſſity of what the law hath juſtly eſtabliſhed, an inviolable ſecrecy to be obſerved by attornies, in order to render it ſafe for clients to communicate to their attornies all proper inſtructions for the carrying on of thoſe cauſes entruſted to their care; and keeping this original principle in view, it cannot be difficult to determine either the preſent queſtion, or any other that may ariſe on the ſame head. On the other hand, whatever is not neceſſary to that purpoſe, the attorney is at liberty, and in many caſes ought to diſcloſe.

DAWSON, B. coincided, and on the ſame grounds. 9 *St. Tr.* 380.

Rule the Third.

A counſel or attorney may alſo give evidence of facts which came to their knowledge previous to their being employed. *Bull. N. P.* 284.

Rule the Fourth.

A counſel or attorney may give evidence of facts which came to their knowledge before retainer in the cauſe depending; for as to ſuch matters they are clearly in the ſame ſituation as any other perſon. *Bull. N. P.* 284.

Rule the Fifth.

So if the counſel or attorney were preſent when the client was ſworn to any judicial documents; upon an indictment for perjury, upon ſuch ſwearing, they would be competent to prove the fact of taking the oath; for it is a fact of his own knowledge, and no matter of ſecrecy committed to him by his client. *Bull. N. P.* 284.

This rule anſwers the query to the KING, *v.* WATKINSON, and ſhews the deciſion in that caſe to be erroneous. 2 *Str.* 1122. *Ante rule* 1. *p.*

Rule the Sixth.

So alſo if a counſel or attorney be witneſs to a deed produced in a cauſe, ſhe ſhall be examined as to the time it was executed. Lord SAY and SEAL's *caſe*. *Rule* 2. *Ante* .

And if an attorney, who is ſuch ſubſcribing witneſs, refuſes to give evidence of his atteſtation, &c. upon ſervice of a ſubpœna upon him, the court out of which the record iſſues, will grant an attachment againſt him.

This is ſettled in DOE, *ex dim.* JUPP. *v.* ANDREWS, *Trinity*, 18 *Geo.* 3. on a rule to ſhew cauſe, why on ſuch a refuſal an attachment ſhould not be granted.

Morgan

Morgan and *Lade* ſhewed cauſe. *Dunning* in ſupport of the rule.

Lord MANSFIELD ſaid, by atteſting an inſtrument, a man pledges himſelf to give evidence of it whenever he is called upon. His being attorney on the other ſide is no reaſon for his breaking his engagement with the plaintiff. An attorney has no privilege to refuſe to give evidence of collateral facts. I have known an attorney obliged to prove his client's having ſworn and ſigned the anſwer upon which he was indicted for perjury. I think the judge who tried the cauſe would have been warranted in committing this man. *Cowper* 846.

Rule the Seventh.

An attorney may alſo be called to prove his client's handwriting to a note or other inſtrument; and this appears to be the common practice. *Eſpin. N. P.* 719.

Rule the Eighth.

An attorney is not reſtrained by any rule of law from giving evidence of a converſation between him and his clients, touching the juſtice of the cauſe after it has been concluded.

So ruled in COBDEN, *v.* KENDRICK, *Mich.* 32 *Geo.* 3. *B. R.*

An action had been brought ſome time before by the preſent defendant, as indorſee of a promiſſory note for 150*l.* againſt preſent plaintiff as the maker; in which caſe interlocutory judgment had been ſigned, a writ of inquiry executed, a compromiſe entered into, and a warrant of attorney executed for one hundred and fifty pounds.

Between the time of delivering the warrant of attorney and the money becoming due, *Kendrick* told *Allen*, his attorney in the ſuit, that he had only given ten pounds in caſh and his promiſſory note for it, and that it was a lottery tranſaction. This action was now brought to recover back the money ſo paid, on the ground of the want of conſideration, and in proof that that was known

to

to *Kendrick* at the time he took the note. *Allen* was called as a witneſs at the trial, to ſpeak to the converſation abovementioned.

Lord KENYON, C. J. after argument upon his incompetency admitted him, and a verdict paſſed for the plaintiff.

Law renewed his objection, and moved for a new trial, on the ground that *Allen* had been improperly permitted to give evidence of the converſation between him and his client, contending that *Allen* fell within the rule of law, which prohibited an attorney from betraying the confidence placed in him by his client, which confidence laſts ſo long as any proceedings may be had in the cauſe. Here the proceedings were not completely at an end when the converſation was held. The party might have proceeded to judgment in the original ſuit, and the attorney had ſtill his lien for the coſts. So that the relation of attorney and client in reſpect to the parties to the original ſuit, was not determined at the time when the communication was made by *Kendrick* to *Allen*, the attorney.

Lord KENYON, C. J. The difference is, whether the communications were made by the client to his attorney in confidence, as inſtructions for conducting his cauſe, or a mere *gratis dictum*. The former was not the caſe here: on the contrary, the purpoſe in view had been already obtained; and what was ſaid by the client was in exultation to his attorney for having obtained his ſuit. *Rule refuſed.* 4 *Term. Re.* 431. Vide ANNESLEY, *v.* earl of ANGLESEY. *Ante* 241.

Rule the Ninth.

Where the party calls upon his attorney for a witneſs, the other party may croſs examine him; but that muſt be only relative to the ſame matter, and not to the other points of the cauſe.

As in VAILLANT, *v.* DODERMEAD, before lord HARDWICKE, chanc. 1742. The defendant having examined Mr. *Briſtow*, his clerk, in court, the plaintiff exhibited interrogatories for croſs examining him, to which he *demurred*, for

for that he knew nothing of the matter inquired of, except what came to his knowledge as defendant's clerk in court, or agent.

The CHANCELLOR over-ruled the demurrer, and ordered him to anſwer the interrogatories, and ſaid, theſe demurrers ought to be held to ſtrict rules. 2 *Atkins* 524.

Rule the Tenth.

The privilege of ſecrecy is ſtrictly confined to perſons *acting* as *counſel*, *attornies*, or *ſolicitors*, in cauſes, and cannot be extended to thoſe confidentially employed in other profeſſions, or who are not retained in the cauſe at iſſue.

As in the dutcheſs of KINGSTON's caſe, before the LORDS, *April*, 1776, indictment for bigamy.

Caſe of Hawkins, a ſurgeon, being ſworn, was aſked by *Dunning*, one of the counſel for the crown, "Do you "know from the parties of any marriage between "them?"

Mr. *Hawkins* anſwered, "I do not know how far any "thing that has come before me in a confidential truſt "in my profeſſion ſhould be diſcloſed, conſiſtent with "my profeſſional honour."

The lord HIGH STEWARD (earl BATHURST) chancellor, called on the lords to determine, "Whether the "queſtion put by the counſel at the bar ſhould be aſked?"

Lord MANSFIELD. I ſuppoſe Mr. *Hawkins* means to demur to the queſtion, upon the ground that it came to his knowledge ſome way from his being employed as a ſurgeon, for one or both of the parties; and, I take for granted, if Mr. *Hawkins* underſtands that it is your lordſhips opinion, that he has no privilege on that account to excuſe himſelf from giving the anſwer, that then, under the authority of your lordſhips judgment, he will ſubmit to anſwer it. Therefore, if no lord differs in opinion, but thinks that a ſurgeon has no privilege to avoid giving evidence in a court of juſtice, but is bound by the law of the land to do it, Mr. *Hawkins* will underſtand that it is your judgment and opinion, that a ſurgeon has no privilege, where it is a material queſtion,

in

in a civil or criminal cauſe, to know whether parties were married, or whether a child was born, to ſay that his introduction to the parties was in the courſe of his profeſſion, and in that way he came to the knowledge of it. I take it for granted, that if Mr. *Hawkins* underſtands *that*, it is a ſatisfaction to him, and a clear juſtification to all the world. If a ſurgeon was voluntarily to reveal theſe ſecrets, to be ſure he would be guilty of a breach of honour, and great indiſcretion; but to give that information in a court of juſtice, which by the law of the land he was bound to do, will never be imputed to him as any indiſcretion whatever.

The LORDS agreeing with lord *Mansfield*, the witneſs was examined.

Rule the Eleventh.

A *peer* has no ſtronger claim to privilege, when called upon as a witneſs, than a commoner; and muſt give full and unreſerved anſwers to all queſtions put to him relative to the points in iſſue, which a commoner would have been bound to anſwer. 11 *St. Tr.* 246.

As in the KING, *v.* the dutcheſs of KINGSTON, before cited. The *ſolicitor-general* aſked lord *Barrington*, "Did "you ever hear from the lady at the bar that ſhe was "married to Mr. *Hervey?*"

Lord BARRINGTON addreſſed the court, "My lords, I "came here in obedience to your lordſhips ſummons, "ready to give teſtimony to any matter that I know of "my own knowledge, or that has come to me in the "uſual way; but if any thing has been confided to my "honour, or confidentially told me, I do hold, that, as "a man of honour, as a man regardful of the laws of "ſociety, I cannot reveal it."

The dutcheſs of *Kingston* offered to releaſe lord *Barrington* from every obligation of honour.

Lord CAMBDEN. I underſtand from the bar, that rather than your lordſhips ſhould be perplexed with any queſtion that may ariſe upon the noble lord's difficulties in giving his evidence, the counſel will wave the benefit of his evidence in the cauſe. If they think that ſafely

and

and without prejudice to this profecution, they may venture to give up that evidence, your lordſhips will acknowledge the politeneſs of the ſurrender. But give me leave to make one remark upon this proceeding, and to hope that your lordſhips, ſitting in judgment on criminal caſes, the higheſt and moſt important to the lives, liberties, and properties, of your lordſhips, that you ſhall not think it befitting the dignity of this high court of juſtice, to be debating the *etiquette* of honour, at the ſame time when we are trying lives and liberties.

The laws of the land are to receive another anſwer from thoſe who are called to depoſe at your bar, than to be told, that in point of honour and of conſcience, they do not think that they acquit themſelves like perſons of that deſcription when they declare what they know. There is no power or torture in this kingdom to wreſt evidence from a man's breaſt who withholds it; every witneſs may undoubtedly venture on the puniſhment that will enſue on his refuſing to give teſtimony. As to caſuiſtical points, how far he ſhould conceal or ſuppreſs that which the juſtice of his country calls upon him to reveal, that I muſt leave to the witneſſes own conſcience.

The ſenſe of the houſe being taken, on adjournment, whether the queſtion ſhould be put,

The lord high STEWARD, on the return of the LORDS into the houſe, from their chamber of parliament, informed the witneſs (lord *Barrington*) in the ſame manner as a witneſs would have been informed in any other court, that the judgment of the houſe was, "That he "was bound by law to anſwer all ſuch queſtions as "were put to him."

The counſel for the crown, and thoſe for the priſoner, declined aſking any queſtion of the witneſs, but lord *Radnor* perſevered, and vindicated the authority of the *court*, by interrogating lord *Barrington* as to the marriage of the priſoner with lord *Briſtol*, and her having iſſue by that marriage. 11 *St. Tr.* 246.

Rule the Twelfth.

The exemption from giving evidence being the privilege of the client, is ſtrictly confined to the three profeſſional characters of barriſter, attorney, and agent.

In WILSON, *v.* RASTELL, *Trinity*, 32 *Geo.* 3. *B. R.* Action to recover penalties on the ſtatute againſt bribing voters at elections. At the trial, before THOMPSON, B. at *Nottingham* aſſizes. *William Handley*, an agent to the defendant on the election, was examined to certain letters received from the defendant, reſpecting the election, and theſe letters were proved to be in the hands of *B. Handley*, an attorney. *B. Handley* proved that he had received thoſe letters from a Mr. *Handley*, who had them from *William Handley*, who knew of his having them, and deſired him to deſtroy them. He was not concerned as attorney for *William Handley*, (nor could he, being under ſheriff) in any cauſe whatever, neither had he employed any attorney for *William Handley*, but *William Handley* had conſulted him confidentially in his profeſſion; and he had applied to him before and after the receipt of the letters: that he had conſulted both with *William Handley*'s attorney, by his direction, and with *William Handley* himſelf, and that theſe letters were communicated to him in conſequence of the defendant's conſulting him profeſſionally.

The witneſs objected to producing the letters, on the foundation of his profeſſion of an attorney, by which he conceived himſelf bound to withhold them; and the judge thought he was bound ſo to do. On a rule *Niſi* for a new trial—

Erſkine, *Dagnell*, *Coke*, *Lane*, and *Clarke*, ſhewed cauſe. They contended, that *B. Handley*, if not the attorney on record, ſtood in the ſame ſituation both to the defendant and *William Handley*, and therefore could not be called upon to betray the confidence repoſed in him, by the production of the letters in queſtion. He deſcribed himſelf as the confidential, profeſſional adviſer of Mr. *Handley*; and that it was with a view to the protection of his client, that he had poſſeſſed himſelf of the

the letters; for that as *William Handley* would have been liable for any bribery committed by him, as the agent of the defendant, his intereſt was directly involved in the production of thoſe letters which were called for, in order to prove ſuch agency, and fix *William Handley*'s acts upon the defendant. This privilege exiſts even where the attorney called is not upon the record. In one of *Petrie*'s cauſes for bribery, *Reynolds*, who had been *Petrie*'s attorney, though not ſo at the time of the trial, was called to prove ſomething that he had learned in a confidential converſation with *Petrie*; but Mr. juſtice *Buller* would not ſuffer him to give the evidence, and ſtrongly reproached him for his anxiety to reveal the ſecrets of his former client. In madam *du Barre*'s caſe, the court would not permit the perſon who had acted as *interpreter* between the defendants and their attorney, to be examined as to the converſation that had been held between them.

Lord KENYON. I conſidered the interpreter as ſtanding in the ſame ſituation as the attorney himſelf; and I ſaid, that "he was the organ of the attorney."

Mingay, *Garrow*, and *Brough*, *contra*. *William Handley* declared that he was not the defendant's attorney; and it is plain that he did not get poſſeſſion of the letters in that character. Beſides, the defendant had one attorney; and if the privilege could be extended to more than one, it would be attended with great miſchief in caſes like the preſent; for then all election agents would have their mouths ſhut.

Lord KENYON. It expreſsly appears from the evidence of *William Handley*, that he was *not*, nor could not be employed as an attorney, and the privilege of a client only extends to the caſe of the attorney for him; in order to ſhew it may be extended farther, the caſe of confidence repoſed in a friend has been preſſed. But if a friend could not reveal what was imparted to him in confidence, what is become of many caſes even affecting life. Among others Dr. *Ratcliff's caſe*. 9 *St. Tr.* 582. Vide dutcheſs of *Kingston*'s caſe. *Ante* 248.

If the privilege now claimed, extended to all caſes and perſons, lord *William Ruſſell* died by the hands of

an aſſaſſin, and not by the hands of the law; for his friend, lord *Howard*, was permitted to give evidence of confidential converſation between them: all good men indeed thought, that he ſhould have gone almoſt all lengths, rather than have betrayed that confidence; but ſtill if the privilege extended to ſuch a caſe, it was the buſineſs of the court to interfere and prevent the evidence being given. 3 *St. Tr.* 715.

BULLER, J. The privilege is confined to the caſes of *counſel*, *ſolicitor*, and *attorney*: but in order to raiſe the privilege, it muſt be proved that the information, which the adverſe party wiſhes to learn, was communicated to the witneſs in one of thoſe characters, for if he be employed merely as a ſteward, he muſt be examined. It is indeed hard, in many caſes, to compel a friend to diſcloſe a confidential converſation, and I ſhould be glad, if by law, ſuch evidence could be excluded. It is a ſubject of juſt indignation, where perſons are anxious to reveal what has been communicated to them in a confidential manner. In *Petrie*'s caſe, his former attorney, who had been diſmiſſed before the trial, wiſhed to give evidence of what he knew relative to the ſubject, *while he was concerned as the attorney*. I would not ſuffer him to be examined, he acquired his information during the time he had acted as attorney, and the privilege of not being examined to ſuch points, was the privilege of the party, not of the attorney; and that privilege never ceaſes at any period of time. In ſuch a caſe it is not ſufficient to ſay, the cauſe is at an end; the mouth of ſuch a perſon is ſhut for ever. The diſtinction is now well ſettled, it is that the privilege extends to thoſe three enumerated caſes at all times, but that it is confined to theſe caſes only. *Lindſay*, v. *Talbot*. *Bull. N. P.* 284. *Ante*

There are caſes to which it is much to be lamented, that the law of privilege is not extended, thoſe in which medical perſons are obliged to diſcloſe the information which they acquire by attending in their profeſſional characters. The point was very much conſidered in the dutcheſs of *Kingston*'s caſe, where ſir *Cæſar Hawkins*, who had attended the dutcheſs as a medical perſon, made

the

the objection himself, but was over-ruled. 11 *St. Tr.* 243. Vide *Ante* 247, 248.

He then examined the particular facts of the case, and concluded by saying, that as *B. Handley* was neither the attorney of *William Handley*, nor of the defendant, he was improperly prevented from producing the letters in question.

GROSE, J. concurred, and the rule was made absolute. 4 *Term. Rep.* 753.

Rule the Thirteenth.

In cases of high treason, to conceal confidential communications, is in contemplation of law a crime, not only as being a misprision of treason, but a breach of the duty of allegiance, whether the oath be taken or not.

If the oath be taken, the concealment of treason against the king, is not only a breach of allegiance, but of a moral and a religious obligation, by the commission of perjury, part of the oath being, "*not to hear of* "*any ill or damage intended the king, without defending him* "*therefrom!*" And, as is expressed in the oath of abjuration, introduced in the reign of king WILLIAM the third, "*engaging to support the king to the utmost, and pro-* "*mising to disclose all traiterous conspiracies against him.*"

But the wife is not bound to disclose the treason of her husband, though she may be obliged to give evidence against him, on a trial for high treason. Vide *Ante* 169.

Rule the Fourteenth.

A clerk attending on a grand jury shall not be allowed to reveal that which was given in evidence before the inquest. The jurors themselves being sworn to keep secret all that passes before them. *Vin. Abr.* 38.

So in CATHARINE O'BRIEN BUTLER, *v.* MOORE, and *wife*, and *others*, at the ROLLS, *Ireland*, 24 *February*, 1802, a most serious question was determined, respecting the privilege claimed by *Roman catholic priests*, to refuse answering interrogatories, where the facts sought to be disclosed is communicated to them in confidence.

In

In this case a bill was filed, praying to be decreed to the estates of the late lord *Dunboyne*; the plaintiff claiming the same as heir at law, and alledging the will under which the defendant claimed was a nullity, lord *Dunboyne* having been a popish priest, and having conformed and relapsed to popery, which deprived him of power to make a will.

Issue was joined: and the plaintiff produced the reverend Mr. *Gahan*, a clergyman of the church of Rome, to be examined, and interrogatories to the following effect, were amongst others exhibited to him: "What religion did the late lord *Dunboyne* profess, from the year 1783, to the year 1792? what religion did he profess at the time of his death, and a short time before his death?" The witness answered to the first part, *viz.* "That lord *Dunboyne* professed the protestant religion during the time, &c." but *demurred* to the latter part, in this way—"That his knowledge of the matter inquired of (if any he had) arose from a confidential communication made to him in the exercise of his clerical functions, and which the principles of his religion forbid him to disclose: nor was he bound by the law of the land to answer."

Duquery, *Ponsonby*, *Plunket*, *J. Ball*, and *Bellew*, supported the demurrer. They argued that the law, from principles of policy, allowed a confidence which was not to be betrayed: and instanced the cases of barrister and client; attorney and client; husband and wife; magistrate and informer; grand juror, &c. These they said were analogous cases, and courts of justice would not restrain the exercise of religious duties, by compelling a disclosure of what was confidentially communicated by a repentant sinner to the minister of GOD. The Roman catholic religion was not only tolerated, but sanctioned by the legislature, and it was unreasonable to say, that contradictory duties were imposed. *First*, that a Roman catholic clergyman should exercise his religion, and then be called upon to violate the tenets of that religion, by betraying the confidence reposed in him.

Burston,

Burſton, *Saurin*, *Curran*, *O'Grady*, and *J. Lloyd*, *contra*. Obſerved that the claim of exemption from giving evidence is ſcrutinized with a jealous eye; and the perſon relying upon it, muſt eſtabliſh his right, by ſhewing a poſitive law or expreſs authority. The caſes alluded to eſtabliſh nothing beyond the particular character ſtated in them; and there was no inſtance in the hiſtory of the law of ſuch a claim as the preſent. It ſhould therefore be ſuppreſſed as unprecedented, impolitic, and dangerous.

MASTER of the ROLLS, (ſir *Michael Smith*, bart.) Thought there was no difficulty in the caſe, though it had run into a great length of diſcuſſion, which he indulged, as being moſt likely to give ſatisfaction upon a queſtion which ſeemed to involve ſomething of a public feeling. But he was bound to over-rule the demurrer. It was the undoubted legal conſtitutional right of every ſubject of the realm, who has a cauſe depending, to call upon a fellow ſubject to teſtify what he may know of the matters in iſſue; and every man is bound to make the diſcovery, unleſs ſpecially exempted and protected by law. It was candidly admitted, that no ſpecial exemption could be ſhewn in the preſent inſtance, and analogous caſes and principles alone were relied upon: and, there was no doubt, that analogous caſes and principles were ſufficient for judicial determination. But the principle muſt be clear as light, and the analogy irreſiſtably ſtrong. That clearneſs of principle and ſtrength of analogy did not appear in this caſe, and demurrers of this nature being held ſtrictly, he was obliged to overrule it. *M. S.*

He cited *Vaillant*, v. *Dodermead*. 2 *Atkyns* 524.

CHAPTER

CHAPTER XXII.

Of the privilege which the Law gives to Witneſſes, by protecting them from anſwering Queſtions which tend to ſeek accuſation—though they are ſworn to give evidence of the whole truth.

Rule the Firſt.

A WITNESS ſhall not be aſked any queſtion, the anſwering to which might oblige him to accuſe himſelf of a crime. 2 *Hawk. Pl. Cr. ca.* 46.

As in the KING, *v.* NATHANIEL READING, *commiſſion of Oyer and Terminer*, 31 *Car.* 2. for a miſdemeanor, 1697.

The COURT informed the priſoner, that if he offered to aſk any queſtion of the witneſs *(Bedlow)* on his oath, to make him accuſe himſelf, it muſt be oppoſed. And that as a pardon which he had from the crown, for the offence imputed to him ſet him right, he ſhould not be called upon to calumniate himſelf. 2 *St. Tr.* 822. 1035. *Tabſborough's caſe.*

So in the proceeding againſt the earl of SHAFTSBURY, *Old-Bailey, Decemb.* 33 *Car.* 2. 1681. NORTH, C. J. ſaid a man muſt not be impeached but where he may anſwer for it: a pardon puts him in *ſtatu quo*, and he is not to defame or accuſe himſelf. 3 *St. Tr.* 439. *Ante*

So in the KING, *v.* TITUS OATES, *Eaſt.* 1 *Jac.* 2. 1685. *B. R.* for perjury. OATES aſked of the witneſs *Hilſley*, a Roman catholic witneſs, what buſineſs he had at St. *Omer's*, ſix years before.

The *attorney-general* objected to the queſtion, and,

JEFFERIES, C. J. ſaid, it could not be put, becauſe it might make the witneſs obnoxious to ſome penalty, and no man is to be made liable to puniſhment by enſnaring queſtions.

The ſame witneſs being again aſked by *Oates*, by virtue of his oath, whether the houſe where he lodged at St.

St. Omer's, was not governed by prieſts and jeſuits, the *chief juſtice* ſaid, it was not a queſtion fit to be aſked, and told the witneſs he was not bound by his oath to anſwer it. 4 *St. Tr.* 9, 10.

In the KING, *v.* ſir JOHN FRIEND, *Old-Bailey, ſeſſions, March,* 8 *Will.* 3. 1695. High-Treaſon. The priſoner deſired to know from Mr. *Porter,* a witneſs, whether he was a Roman catholic or not?

The *ſolicitor-general* objected, deſiring, that before he anſwered the queſtion, he might be acquainted with the danger of it; he was bred a proteſtant, and then turning Roman catholic, he was ſubject to a ſevere penalty.

HOLT, C. J. (the other judges concurring) ſaid, if a man be a Roman catholic, notwithſtanding his religion he is a good witneſs. But he is not to anſwer this queſtion; it may ſubject him to ſeveral penalties, at leaſt, he is liable to proſecution upon ſeveral acts of parliament that are very penal, and no man is bound to anſwer any queſtion that tends to make him accuſe himſelf, or ſubject him to any penalties, or to infamy. If a witneſs be aſked whether he were a deer-ſtealer, or whether he were a vagabond, or any other thing that will ſubject him to puniſhment, either by ſtatute or by common law, whether he be guilty of petit larceny or the like, the law does not oblige him to anſwer ſuch queſtions. And to the preſent purpoſe: to aſk a man whether he be a popiſh recuſant is to ſubject him to danger: for when you aſk him whether he were bred up in that religion, then, for him to own himſelf of that religion now, is to own as great a crime as the priſoner ſtood charged with. If it were not ſo, but if he was always bred in that religion, yet there are very great penalties that he is ſubject to, as the confiſcation of two third parts of his eſtate, and ſeveral other things. We muſt keep the law ſteady and even between the priſoner and the witneſs; and if the witneſs does not anſwer it voluntarily of himſelf, it cannot be impoſed upon him, for he is not obliged to anſwer it. 4 *St. Tr.* 605, 606.

And in ANNESLEY, *v.* the earl of ANGLESEY, *Exchéq. Irel. Mich.* 27 *Geo.* 2. 1743. When *John Ryan* was croſs examined, the counſel for the defendant aſked him,

"What religion are you of?" he answered, "I am a "Roman-catholic:" then they asked him, "Do you "follow any business, or are you of any profession?" (he was a Roman catholic priest) the court said, "You "need not answer that question, if you think it will "criminate yourself," and he refused answering it. 4 *St. Tr.* 414. *in notes.*

Rule the Second.

But where a witness has been convicted of an *infamous* crime, and has suffered the execution of the judgment, he may be questioned as to that fact. *Ante*

As in the KING, *v.* EDWARDS, *Mich.* 32 *Geo.* 3. *Ban. Reg.* On an application to bail the prisoner, who was charged with grand larceny, one of the bail was asked, whether he had not stood in the pillory for perjury? This question was objected to, as tending to criminate himself. But,

The COURT over-ruled the objection; saying there was no impropriety in the question; as the answer could not subject him to any punishment; and the bail admitting the fact, was rejected. 4 *Term. Rep.* 440.

Rule the Third.

Neither can a witness be compelled to answer any question to shew his own turpitude or infamy. 4 *Inst.* 479. 2 *Sess. Ca.* 171. *Ante* 257.

Rule the Fourth.

But though a witness is not to be asked whether he ever committed any particular offence, yet he may be asked, whether he ever was *tried* for, or charged with a particular offence, and is bound to answer the question.

As in the KING, *v.* the reverend WILLIAM JACKSON, *East.* 35 *Geo.* 3. *B. R. Ireland, at bar,* for High-Treason.

Curran, one of the prisoner's counsel, was permitted, without objection, to ask *Cockayne,* an attorney, and a witness for the crown, on the cross-examination;

"Whether

" Whether he had ever obtained a pardon, and for " what? whether he had ever been tried for perjury? " whether he had ever been pardoned for perjury? per- " jury in what? and whether he had ever told any per- " ſon that the affidavit on which the perjury was aſſigned " was falſe?" *Ridgeway's Rep. Jackſon's Tr.* 50.

And in the KING, *v.* DUNN, and CARTY, *Dublin, comm. Oyer* and *Term. Decemb.* 38 *Geo.* 3. 1799. Indicted for a conſpiracy to murder lord *Carhampton.*

Curran, one of the priſoner's counſel, on croſs-examination, aſked *James Ferris*, a witneſs for the crown, " Whether, he being an attorney, had ever been cen- " ſured by any of the courts? whether the charge was " for embezzling his client's money? whether he ever " iſſued a writ in another attorney's name? whether he " was not charged with threatening a proſecution for a " rape? whether he had not ſworn he knew nothing of " iſſuing a writ, which he had iſſued, &c." *Ridgeway's Rep. of the Trial*, 27.

So in the caſe of the KING, *v.* JAMES WELDON, tried for High Treaſon, at *Commiſſions of Oyer and Terminer*, for the county and city of *Dublin*, *December* 1795, and *February* 1796.

William Lawler, a witneſs, who admitted having been an accomplice in the treaſon he was called to prove againſt the priſoner, was aſked by *Curran*, one of the priſoner's counſel, on his croſs-examination: " What " religion are you of?" and having anſwered, " a pro- " teſtant," he was then aſked, " have you always pro- " feſſed the proteſtant religion? do you think you know " the principles and grounds of that religion? were you " taught to believe there was a GOD? were you taught " that there was the ſuffering of his ſon, for the re- " demption of mankind? do you underſtand that your " belief of thoſe ſacred doctrines is the foundation of " the oath you have taken? have you never upon any " occaſion declared, that you did not believe there was " a GOD?" here the witneſs heſitated.

The *attorney-general*, *(Wolfe)* objected to the queſtion, and ſaid, it ought not to be anſwered, if it expoſed the witneſs to puniſhment.

Mac Nally, for the priſoner, ſaid, an atheiſt is not competent to give evidence; and on that ground we impeach the competency of *Lawler*. I am prepared to ſhew that the queſtion is legal. Vide *Poſt* 261.

Mr. *Prime-ſerjeant (Fitzgerald)*. If this ſort of uſe is to be made of the queſtion, the court will determine upon it.

CHAMBERLAINE, J. If he be expoſed to temporal puniſhment, he is not bound to anſwer.

Curran, for the priſoner. It would be a different thing, and a man might ſay, "it is my misfortune to be "converted by the arguments of atheiſts." He might have read *Hume* upon miracles, and have adopted his notions—he then declined preſſing the queſtion.

In the KING, *v.* JOHN LEARY, tried for High Treaſon, at the ſame commiſſion. The ſame witneſs, *William Lawler*, was croſs-examined for the priſoner, by *Mac Nally*, "You have ſworn that you believe in GOD, have "you ever made any declaration to the contrary?" "Never. I was at a meeting with one *Galland* and "*Le Blanc*, who would wiſh to perſuade me that there "was no GOD!" "And you always, I preſume, have "held a contrary doctrine?"

COURT. He is not bound to anſwer that queſtion.

Mac Nally. An atheiſt is not competent to give evidence, though a mahometan or a pagan, believing in a ſupreme being is. I conceive the queſtion to be legal, it was ſo determined in the *King*, *v. Taylor*, reported in *Peake's Niſi Prius*; in that caſe Mr. juſtice BULLER ruled, that the proper queſtion to be aſked a witneſs, in order to ground an objection to his competency, on account of infidelity, is not whether he believes in *Jeſus Chriſt*, or the holy goſpels, but whether he believes in GOD and a future ſtate. The court allowing the examination to go on, the priſoner's counſel proceeded—"You ſaid you were taught to believe in the proteſtant "religion, and that there was a Saviour?" "I was." "Have you always, and do you yet adhere to thoſe opi-"nions and faith?" "Theſe men whom I mentioned "before, had with their doctrine almoſt perſuaded me, "that there was no Saviour, but I ſaw ſince through it."

This

This anſwer of courſe removed the objection to his *competency*; the examination however went to his *credit*, and the priſoner was acquitted. *Ridgeway's report of the trial.*

The KING, *v.* TAYLOR, *Niſ. Pri. Trinity, Geo.* 3. is in point. The defendant was indicted for conſpiring with one *Peverel*, and *Humphrey Triſtram Potter*, to ruin the credit of the proſecutors, who were conſiderable traders, and in proſecution of ſuch conſpiracy, publiſhing a libel in a newſpaper, purporting to be an advertiſement for calling together the creditors of the ſaid *partners.*

Mingay, for the priſoner, aſked *Smith*, when produced for the crown, whether he believed in *Jeſus Chriſt?*

Erſkine, for the crown, objected to the queſtion: and, BULLER, juſtice, over-ruled it; ſaying it ſhould not be put.

Mingay then aſked the witneſs whether he believed in the *holy goſpels of God*, on which he had been ſworn? he anſwered, he believed them, as far as he could underſtand them. *Mingay* inſiſted this was no anſwer to his queſtion, and was proceeding in his examination, when—

BULLER, juſtice, ſaid, that this was not the proper queſtion, and aſked him whether he believed in GOD, the obligation of an oath, and a future ſtate of rewards and puniſhments? and on his anſwering in the affirmative he was admitted. But ſeveral perſons being called to affect his character, and ſwearing that from what they had obſerved in his converſation and manners, that they would not believe him on his oath, the priſoner was acquitted. *Peak's Niſ. Pri.* 11. And Vide *Omichund*, v. *Barker.* *Ante* 64.

CHAPTER

CHAPTER XXIII.

On the certainty of Evidence; when it may be given on the KNOWLEDGE *of the Witneſs; and when it may be received on his* BELIEF.

Rule.

A WITNESS, when under examination in chief, muſt not depoſe as he *thinks*, or *perſuades* himſelf to *believe*: he muſt ſwear from his *knowledge* of the fact. But his belief is evidence on the croſs examination, whether he appears on the part of the crown or of the priſoner.

So in ADAMS, *v.* CANON, *Star-chamber*, *Mich.* 19 *Jac.* 1. An action was brought for maintenance in divers ſuits; and alledged particularly, that the defendant diſburſed money for one *Powell*, in an action which *Thomas Wood* brought againſt him in chancery, and to prove this two witneſſes were produced. One depoſed that he knew it to be true; and being examined why he would ſwear that; anſwered, becauſe his father had ſaid ſo. In this caſe much was ſaid about the depoſition of witneſſes. *Firſt*, that if one witneſs depoſe of his own knowledge, of the very point in queſtion, and the other in the circumſtances, that ſhall be ſufficient ground for the judge to paſs ſentence; and this was ſaid by MONTAGUE, C. J. then preſident of the council. *Secondly*, that it is not ſatisfactory for the witneſs to ſay, that he *thinks*, or *perſuadeth himſelf*, that is *believes*, and that for three reaſons laid down by lord *Coke*. 1. Becauſe the judge is to give an abſolute ſentence, and therefore ought to have more ſure ground than thinking. 2. The witneſs cannot be proſecuted for perjury; that judges, in their judicial ſituation, are always to give judgment *ſecundum allegata et probata*, notwithſtanding private individuals think otherwiſe. And ſo *Canon* was diſcharged. *Dyer* 53, *in note, to* ROLFE, *widow, v.* HAMPDEN, knight.

NOTE.

NOTE. As to the ſecond reaſon, though lord *Coke* hath laid it down as law, and *Hawkins* has adopted it, it has been over-ruled.

HAWKINS ſaith, that "No oath ſhall amount to per-"jury, unleſs it be ſworn abſolutely and directly; and "therefore he who ſwears a thing according as he *thinks*, "*remembers*, or *believes*, cannot, in reſpect of ſuch an "oath, be found guilty of perjury." 3 *Inſt.* 166. 1 *Hawk. P. C. ca.* 69.

But lord chief juſtice DE GREY, in conſidering this queſtion, declared it was a miſtake mankind had fallen into, that a witneſs cannot be convicted of perjury, who ſwears that he *thinks* or *believes* a fact to be true, for that he certainly may, and the caution of the ſwearing only renders the proof of it more difficult. *Millar's ca.* 3 *Wilſon* 427. 2 *Blackſ. Rep.* 881.

And earl MANSFIELD confirmed this opinion in *Pedby's* caſe. It is, ſaid his lordſhip, certainly true, that a man may be indicted for perjury, in ſwearing that he *believes* a fact to be true, which he knows to be falſe. *Leach's Cr. Ca.* 270.

And if this was not the caſe, witneſſes ſwearing falſely on their *belief*, when under croſs-examination, would eſcape with impunity.

To theſe rules there is an exception, in the caſe of profeſſional men giving evidence; they are always examined to the beſt of their ſkill and knowledge. Vide *poſt*

CHAPTER XXIV.

On the right of a Witneſs to refreſh his memory, when giving evidence from written memorandums.

Rule the Firſt.

A WITNESS ſhall not be permitted to read his evidence from any written, or printed paper.

But

But it appears, in the courſe of the ſtate trials, that it hath always been cuſtomary for the courts to allow witneſſes to look upon their written notes, to refreſh the memory.

As in the dutcheſs of KINGSTON's caſe, before the LORDS, 16 *Geo.* 3. a witneſs, named *Laroche*, was permitted to refer to written memorandums, copied from minutes in his own hand writing; but which memorandums had been copied by his own deſire, and had continued in his poſſeſſion ſince they were ſo copied. 11 *St. Tr.* 255.

And in the KING, *v.* JAMES DUNN, and PATRICK CARTY. *Commiſſion of Oyer and Terminer*, city of *Dublin*, *October*, 1797. Indicted for conſpiring to murder the earl of *Carhampton*. *James Ferris*, an approver, enquired of the court, if he was at liberty to recur to notes to aſſiſt his memory.

Mac Nally, for the priſoner, examined the witneſs as to the manner of his preparing theſe notes: and the witneſs admitted, that he had originally taken notes two or three days after his meeting with the priſoners. That he took them at different times; but always immediately after each particular tranſaction. That he had reviſed, embelliſhed, diminiſhed, and increaſed them, occaſionally, at ſubſequent periods.

The counſel, on this examination, ſubmitted to the court, that as notes regularly taken, could only be reforted to by a witneſs, for the ſpecial purpoſe of refreſhing his memory, as to facts immediately taken down by him, the witneſs ſhould not be permitted to recur to theſe notes after confeſſing that they had been reviſed, embelliſhed, diminiſhed, and increaſed, which ſhewed that they were not original minutes, and that they were prepared and dreſſed up, probably, not for merely refreſhing the memory of the witneſs, but for a much more ſerious purpoſe, fabricating evidence to ſupport the charge in the indictment. He cited *Doe*, on the demiſe of *Philips*, v. *Pickering*. 3 *Term. Rep.* 749. *Poſt* .

The COURT gave no decided opinion upon the point; but BOYD, J. who ſat with DOWNES, J. deſired the witneſs to ſtate what he could from his recollection; and that

that he might recur to the notes afterwards if neceſſary. *Ridgeway's Rep. Dunn's trial*, 10. *M. S. note of the ſame trial.*

Rule the Second.

A witneſs may refreſh his memory by any book or paper, if he can afterwards ſwear to the fact, from his own recollection; but if he cannot ſwear to the fact from recollection, any further than as finding it entered in a book or paper, the original book or paper muſt be produced.

As in Doe, on the demiſe of Church, *v.* Perkins, *Trinity*, 30 *Geo.* 3. *B. R.* Ejectment.

This came on upon motion for a new trial, and one of the objections was to evidence received on the trial by lord Loughborough, C. J. C. P.

One *Aldridge* had been permitted to give evidence concerning the dates of ſeveral tenancies, from *extracts* made by himſelf out of an original book; confeſſing upon his croſs-examination, that he had no memory of his own of thoſe ſpecific facts, but that the evidence he was giving as to thoſe facts, was founded altogether upon the extracts which he had made from the abovementioned book.

Erſkine, *Partridge*, *Bower*, *Adair*, and *Wilſon*, againſt granting a new trial, ſaid.—Although neither the original book itſelf, any more than the extracts, could be produced as evidence in themſelves, yet the witneſs who heard the declaration of the tenants, and either wrote the entries with his own hand, or ſaw them written by the receiver, might be permitted to refreſh his own memory by *referring* to either. The objection only holds where the inſtrument or paper referred to is brought forward as evidence in itſelf of a fact. And therefore if it had been attempted to give in theſe extracts to the officer of the court, to be read in evidence in the cauſe, there would be ground for the argument. But the evidence of the fact here was given on the oath of *Aldridge*: and they cited the dutcheſs of *Kingſton*'s caſe. *Ante.*

Lord KENYON, C. J. read a note from a MS. of the late lord *Ashburton:* from which it appeared, that in Michaelmas vacation, 1753, before the lord CHANCELLOR, Mr. *Noel* moved to ſuppreſs depoſitions, on a certificate from the commiſſioners, before whom they had been taken, that the witneſs, whoſe depoſitions they were, refreſhed her memory during her examination, by minutes conſiſting of ſix ſheets of paper, of her own hand-writing, the ſubſtance of which ſhe declared to them ſhe had ſet down, from time to time, as the facts occurred to her memory; that five of the ſheets were drawn up in the form of a depoſition, which ſhe told them was done by the plaintiff's ſolicitor, whom ſhe had requeſted to digeſt her notes, and reduce them to ſome order; and after he had done ſo, ſhe tranſcribed and altered them wherever it was neceſſary, to make them conſiſtent with her meaning. The certificate added, that ſhe declared the ſix ſheets to have been entirely drawn by herſelf, unaſſiſted by any perſon whomſoever: that as they apprehended they had no right to take the minutes from her, ſhe had frequent recourſe to them during her examination: and this certificate was ſigned by all the commiſſioners.

Mr. *Noel* inſiſted, that this practice was too dangerous to have the countenance of the court; and that there was a ſufficient foundation for this application to ſuppreſs the depoſitions.

The *attorney* and *ſolicitor-general* oppoſed the motion. They inſiſted, that nothing was more frequent than to allow witneſſes in a court of law the uſe of minutes to refreſh their memory. That the only circumſtance which ſeemed to diſtinguiſh this caſe from that, and to give a colour to the preſent application, was the witneſſes employing the plaintiff's attorney to digeſt her *memoranda*; but there could not be much weight in that circumſtance, when it was conſidered that it was not pretended that there had been any tampering with the witneſs, and that ſhe had carefully altered theſe papers wherever her attorney had miſtaken her meaning; that ſhe ſwore poſitively to the truth of every part of them; and though it might be improper to write the whole of a depoſition before

before examination, yet where a perſon was to be examined to a great number of dates, &c. it was very neceſſary to have ſome helps of this kind.

Lord CHANCELLOR. Whether there has been any tampering or no I know not, but I know there has been a great miſtake, both by the parties and the commiſſioners, who, however, did right after their miſtake, to lay it before the court. Should the court connive at ſuch proceedings as theſe, depoſitions would really be no better than affidavits; for ſhould a witneſs be permitted to uſe a paper, eſpecially one drawn up by the attorney of one of the parties, though from *memoranda* furniſhed by the witneſs, I might as well let the attorney draw an affidavit for her and uſe that inſtead of a depoſition. She inſiſts, indeed, that ſhe altered and amended it; but every body knows that ſlight alterations in a phraſe makes it convey very different ideas. To be ſure, in ſome caſes, a man may uſe papers at law, but I have known ſome judges, and have adhered chiefly to that rule myſelf, uſe only papers drawn up as the fact happened, and all other papers I have bade them put in their pockets; and if they had been offered which were drawn by the attorney, I ſhould have reprimanded him ſeverely. As to dates and names, which are merely technical, it is quite another thing. The commiſſioners ſhould have rejected theſe depoſitions, but as they have fairly repreſented the fact, and the whole of the motion is to ſuppreſs the depoſitions for the precedents ſake, they ſhall be ſuppreſſed. And as publication is not paſſed you may examine the witneſs.

BULLER, J. read another *M.* S. TANNER, *v.* TAYLOR, *Hereford, Spring aſſizes*, 1756. In an action for goods ſold and delivered; the witneſs who proved the delivery, took it from an account which he had in his hand, being a copy, as he ſaid, of the day-book, which he had left at home, and it was objected that the original ought to have been produced.

LEGGE, B. ſaid, that if he would ſwear poſitively to the delivery from recollection, and the paper was only to refreſh his memory, he might make uſe of it: but if he could not from recollection ſwear to the deliveries any

further, than as finding them entered in his book, then the original ſhould have been produced: and the witneſs ſaying he could not ſwear from recollection, the plaintiff was non-ſuited.

Lord KENYON ſaid, that the rule appeared to have been clearly ſettled, and that every day's practice agreed with it. And that comparing this caſe with the general rule, the COURT were clearly of opinion, that *Aldridge*, the witneſs, ought not to have been permitted to ſpeak to facts, from the extracts which had been made uſe of at the trial. *Rule abſolute for a new trial.* 3 *Term. Rep.* 749.

CHAPTER XXV.

Of the Confeſſion of the Defendant upon an indictment for High Treaſon.

[VIDE *Ante, Ca.* 6. *p.* 37.]

Rule the First.

FROM the various deciſions ſince the enacting of the 7 *of Will.* 3. reſults this rule of law, that with regard to all collateral facts, not conducing to the proof of the overt-act, that whatever was evidence at common law is ſtill good evidence under the ſtatute, the proviſion of the ſtatute being confined to the proof of the overt-act. *Foſ.* 242.

Therefore evidence of a confeſſion of high treaſon, by two witneſſes, upon an examination before a juſtice of peace, was ruled to be ſufficient to convict the perſon ſo confeſſing, within the meaning of the 1 *Edw.* 6. *ca.* 12. *and* 5 *&* 6 *Edw.* 6. *ca.* 11. which required two witneſſes in high treaſon, "unleſs the offender ſhould wil-"lingly, without violence, confeſs the ſame." 2 *Hawk. P. C. ca.* 46. *ca.* 25.

And this was determined by all the judges, in the KING, *v.* THONG, *Newgate ſeſſions, December*, 14 *Car.* 2. that if a conſpirator be examined before a privy counſellor,

fellor, or a juſtice of the peace, and upon his examination, without torture, he confeſs the treaſon; if after, at his trial he deny it, two witneſſes to prove that confeſſion, are good evidence againſt him that made the confeſſion at his examination aforeſaid; and in that caſe there needs no witneſs to prove him guilty of the treaſon, for that confeſſion puts it out of the ſtatute which requires two witneſſes to prove the treaſon, unleſs the party ſhall without torture confeſs the ſame, and the confeſſion there ſpoken of, is not meant a confeſſion before the judges at his trial, but a confeſſion upon his examination: but ſuch confeſſion, ſo proved, is only evidence againſt the party himſelf who made the confeſſion, but cannot be made uſe of as evidence againſt any others, whom on his examination he confeſſed to be in the treaſon. *Kelyng* 18.

Rule the Second.

But the above rule is remedied by ſtatute, which requires two witneſſes, "unleſs the party ſhall willingly, "without violence, in *open court*, confeſs, &c." 7 *Will.* 3. *ca.* 3.

Foſter obſerves ſtrongly on a difference in the wording the ſtatute of *Will.* 3. and the ſtatutes of *Edw.* 6. which merits conſideration, ſo far as warrants a different conſtruction on them. *Foſ.* 240.

The words of the ſtatute of *Will.* 3. are, "unleſs the "party ſhall willingly, *without violence*, in *open court* "confeſs the ſame." The words in *open court*, the ſtatutes of *Edw.* 6. have omitted. Theſe words ſeem to have been inſerted, in order to carry the neceſſity of two witneſſes to the overt-acts, farther than the ſtatutes of *Edw.* 6. were formerly thought to carry it. Vide *the preceding opinion from Kelyng* 18. 1 *Hale P. C.* 304. *and Tonge's caſe*, *Ante* 268. 2 *Anderſ.* 67.

For the conſtruction of theſe ſtatutes hath been, that a confeſſion upon an examination of the party *taken out of court, before the privy council, a magiſtrate, or perſon having authority to take ſuch examination*, proved upon the trial by two witneſſes, is evidence of itſelf ſufficient to convict,

convict, without further proof of the overt-acts; for, ſay the books, ſuch confeſſion *putteth the caſe out of the ſtatute, it ſatisfieth the ſtatute*; and by confeſſion is not meant a confeſſion before a judge upon the priſoner's arraignment, but upon his examination before a magiſtrate; for ſaith *Coke*, the words without violence, mean willingly, *without any torture*, and the judge is never preſent at any torture, neither upon the priſoner's arraignment was any torture ever offered. 3 *Inſt.* 25. 2 *Hale P. C.* 304. *Foſt.* 241.

But at a conference among the judges, preparatory to the trial of *Francis Francia*, at which the attorney and ſolicitor-general, who were to conduct the proſecution, aſſiſted, no regard ſeemeth to have been paid to the antecedent authorities; for it was then agreed, that upon the foot of thoſe acts of *Edw. 6.* by confeſſion is meant only a confeſſion *upon the arraignment of the party*, which it was ſaid *amounteth to a conviction.* *Ibid.*

In the KING, *v.* FRANCIS WILLIS, *Old-Bailey*, 9 *Ann.* 1710, the counſel for the crown called a witneſs to prove what the priſoner had ſaid to him, touching the ſhare he had in the treaſon he then ſtood charged with. The priſoner's counſel objected to this ſort of evidence, and inſiſted, that by this act no confeſſion, except it be made in open court, ſhall be admitted in evidence. But the judges preſent were very clear, that ſuch confeſſion is evidence *admiſſible*, proper to be left to a jury, *and will go in corroboration of other evidence* to the overt-acts, though it might be ſtill a diſputable point, whether a confeſſion out of court, proved by two witneſſes, is of itſelf *ſufficient to convict.* 8 *St. Tr.* 254, 255, 262, 263.

Upon this laſt point, none of the judges, except WARD, C. B. gave a *direct* opinion; his words are, "a "confeſſion ſhall not ſupply the want of a witneſs, *there* "*ſhall be two witneſſes to the treaſon notwithſtanding*, but to "ſay it ſhall not be given in evidence there is no ground "for it." *Foſ.* 242.

In the ſame caſe, ſir JAMES MONTAGUE, attorney-general, admitted that two witneſſes are neceſſary beſides the confeſſion.

Sir

Sir ROBERT EYRE, the ſolicitor-general is more explicit, and ſaith he, "the priſoner ſhall not be convicted "on a trial without two lawful witneſſes, that is the "thing provided for. It was to exclude a precedent "that had been ſettled in *Tonge*'s caſe, but it was not "deſigned to exclude all confeſſions. That was evi-"dence at law, and always muſt be ſo. The deſign of "the act was, to exclude confeſſions from having the "force of a conviction, unleſs it were in a court of "record; and to prevent a confeſſion proved by two "witneſſes from being a ſufficient ground for conviction."

In the argument in the caſe of *Willis*, the caſes of *Vaughan*, before cited, and of one *Smith*, alias *Mery*, were cited. The caſe of *Smith* was at an admiralty ſeſſions in *June* 7 *Ann*, on an indictment for adhering to the queen's enemies on the high ſeas. He made alienage his defence as *Vaughan* did, and his confeſſion that he was an Engliſhman born, was holden to be admiſſible evidence, though his counſel inſiſted on this act of the 7*th Will.* 3. *Foſt.* 242.

The COURT in the ſame caſe ſaid, that the 7*th Will.* 3. was to prevent a confeſſion being *concluſive* evidence of *the very overt-act*, not to take away that ſort of evidence of *collateral matters*: and *Vaughan*'s caſe was relied on. *Ib.*

Upon the trial of JOHN BERWICK, *ſpecial commiſſion at St. Margrett's-hill, Southwark, July* 17, 1746, 19 *Geo.* 2. There was only one witneſs that proved the priſoner to have been in arms with the rebels. This witneſs proved that he was enrolled and reviewed as a lieutenant in the rebel regiment called the Mancheſter regiment, and did duty as ſuch at *Penrith* and *Carliſle*.

Two other witneſſes, officers in the duke of CUMBERLAND's army, ſwore that after the ſurrendering of Carliſle, they were ordered by the duke to take an account of the names of the officers, and of their reſpective ranks in the rebel garriſon; that accordingly they went to the priſon where the officers were confined apart from the common men, and took ſuch account of them. That the priſoner *Berwick* appeared among the officers, and gave in his name to them as lieutenant in the Mancheſter regiment.

The

The counsel for the prisoner insisted that the charge was not proved, for that in all cases of high treason there must be two positive witnesses to prove the facts of treason.

FOSTER, J. doubted whether this declaration, being made after the surrender of Carlisle, can be considered in any other light than as a confession after the fact. And with regard to a confession after the fact, said, he never doubted whether it might be given in evidence as a corroborating proof. His doubt was, whether it being proved by two witnesses is a conclusive evidence, not an evidence sufficient of itself to convict without other proof, since the 7 *Will.* 3. requires two witnesses to overt-acts, or a confession in open court.

WILLES, C. J. and ABNEY, J. were of opinion, that this declaration of the prisoner is not to be considered as a bare confession after the fact, but as an evidence of the fact itself, *viz.* that the prisoner did appear and take the rank of a lieutenant in the rebel garrison.

They also thought, that a confession after the fact, proved by two witnesses, was sufficient to convict under the stat. of *Will.* 3. 9 *St. Tr.* 559.

FOSTER, taking a retrospect of the case of *Francia*, above cited, and of his own opinion says, he had not heard of the opinion in *Francia*'s case before the trial of *Berwick*, though he believes some of the judges had seen it, it was cited and much urged by the counsel for the crown; and a manuscript note of it was produced; and he adds in a note, evidence of confession was held sufficient by the judges who sat upon the commissions in the North in the same summer, upon the authority of the opinion in the *King*, v. *Berwick*. *Fos.* 241.

Notwithstanding the difference of opinion which appears between *Foster*, and the other judges in *Berwick*'s case, he does not arraign the proceedings, but says, that the facts proved with his declaration all by two witnesses, were properly considered by two learned judges, not as a bare confession after the fact, but as an evidence upon the spot, and in the very scene of action. *Fos.* 244.

And

And with regard to the proceedings in the North, already mentioned, he ſays, "I doubt not the learned "judges went upon good grounds; the circumſtances of "each caſe, which I am not apprized of, being duly "conſidered."

But a careful peruſal of *Foſter*, induces a belief, that there was more compliment than ſincerity in the laſt obſervation. The authority of the opinion in 1716, by no means meets his approbation, though he ſays, "it is "perhaps now too late to controvert it, warranted as it "hath been by late precedents," an obſervation to which common ſenſe cannot accede. No preſcription, no precedent, no length of time, nor no number of determinations can ſanction error or injuſtice; on the contrary, the repetition of a bad precedent converts the judgment of the court into oppreſſion, and it is aſtoniſhing that *Foſter* ſhould even countenance a proceeding that does not fully meet his approbation.

Yet, inſtead of condemning the meaſure, he ſays, all that I inſiſt on is, that the rule ſhould never be carried further than that caſe warranteth; never further than to a confeſſion made, during the ſolemnity of an examination before a magiſtrate, or perſon having authority to take it, when the party may be preſumed to be properly upon his guard and apprized of the danger he ſtandeth in, which was an ingredient in the caſe of *Francia* and of *Gregg*, cited in the argument of *Francia*'s caſe. And all thoſe already cited, which came in judgment before the ſtatute of king *William*. *Foſ.* 243.

For, continues the ſame author, haſty confeſſions made to perſons having no authority to examine, are the weakeſt and moſt ſuſpicious of all evidence. Proof may be too eaſily procured, words are often miſreported, whether through ignorance, inattention, or malice, it mattereth not to the defendant, he is equally affected in either caſe; and they are extremely liable to miſconſtruction. And withal, this evidence is not, in the ordinary courſe of things, to be diſproved by that ſort of negative evidence, by which the proof of plain facts may be, and often is confronted. *Foſ.* 243.

On the whole it may be concluded, that in *England* the *ſtat. of* 7 *Will.* 3. *ca.* 3. (which was never enacted in *Ireland*) prevents *ſuch* confeſſion, as above-mentioned, from having the force of a *conviction*; but does not deſtroy the admiſſibility of it in evidence *for any purpoſe*, except to prove the overt-acts laid in the indictment. The overt-acts muſt ſtill be proved by *two lawful witneſſes*, notwithſtanding the admiſſion of any ſuch confeſſion as to collateral matters; for no confeſſion, except made *in open court*, which in *Francia*'s caſe was determined to mean the arrangement of the party, can be ſufficient ground for a conviction for treaſon.

NOTE. In IRELAND, attempts have been made by the Iriſh commons to obtain an act of parliament ſimilar to the Engliſh *ſtat.* 7 *Will.* 3. but they always failed. In the preſent reign, a part of the Engliſh act was granted, by which a perſon indicted for high treaſon under the 25 *Edw.* 3. ſhall have a copy of the whole indictment delivered to him, on requeſt, five days at leaſt before trial: and he ſhall be admitted to defend himſelf by counſel; and the court before whom he is to be tried, or any judge thereof, ſhall immediately, on his requeſt, aſſign him ſuch and ſo many counſel, not exceeding two, as he ſhall deſire, to plead for him and aſſiſt him in making his defence. *Iriſh ſtat.* 5 *Geo.* 3. *ca.* 21. *ſect.* 1. 2. 9 *Stat. at large*, 388.

But in Ireland one witneſs is ſufficient to convict, even though that witneſs ſhould be an accomplice: evidence of the priſoner's confeſſion ſupports the overt-act, as well as collateral facts: the priſoner is neither intitled, as in England, to a copy of the panel from which the jury is to be ſworn, nor to a liſt of the witneſſes to be produced againſt him; and by ſtatute, his peremptory challenges to the jurors are reduced from thirty-five, which are allowed in England, and which was his right at common law, to twenty. *Iriſh ſtat.* 10 *and* 11 *Car.* 1. 2 *Statutes at large* 157. Vide *ca.* 5. *Ante p.* 15.

NOTE. This chapter, according to the original arrangement, ſhould have immediately ſucceeded chapter the ſixth, which treats of confeſſion at common law and

and confeſſion by *ſtat.* 2 *and* 3 *Phil. & Mar. ca.* 10. *Iriſh,* 10 *Car.* 1. *ca.* 18. *Ante* 37.

CHAPTER XXVI.

Of Evidence by Confeſſion or by Accuſation, obtained by the infliction of Torture.

Rule the Firſt.

BY the common law of England, and that law is by adoption, confirmed by ſtatutes, the common law of Ireland, no ſuch engine of power as the rack, or any other inſtrument of torture, can be uſed to furniſh the crown with evidence, extorted out of the priſoner's mouth againſt himſelf or any other perſon. *Forteſq. de Laud. ca.* 22. 3 *Inſt.* 31. *Foſ.* 244.

EMLYN, in his preface to the *State Trials*, notices the excellencies of the Engliſh laws above all others, chiefly to conſiſt in that part of them which regards *criminal proſecutions;* and among other particulars enumerated by him, ſays, "in other countries *racks* and *inſtruments of* "*torture* are applied, to force from the priſoner a con- "feſſion, ſometimes of more than is true; but this is a "practice which *Engliſhmen* are happily unacquainted "with, enjoying the benefit of that juſt and reaſonable "maxim—*Nemo tenetur accuſare ſeipſum. Emlyn Pref. St. Tr. fo.* 3.

FORTESCUE, C. J. and afterwards chancellor, in his lectures on the laws of England, written for the inſtruction of prince EDWARD, ſon to HENRY VI. after reprobating the tortures allowed by the *civil law*, makes this obſervation; what certainty can ariſe from confeſſions of men miſerably tormented! But if ſome innocent perſon, having his mind fixed upon eternal ſalvation, would in ſuch a *Babylonical furnace*, like the three children, bleſs and magnify the LORD, and not *lie*, to the damnation of his own ſoul, and the judge ſhould thereupon pronounce him *not guilty*, doth not that judge,

by the ſelf ſame judgment, judge himſelf *guilty* of all the cruelty and pains wherewith he hath tormented the innocent? O! how cruel is ſuch a law, which, in that it cannot condemn the innocent, condemneth the judge? Sure ſuch a *cuſtom* is not to be accounted a *law*, but rather the highway to the devil! *Fortes. de Laudi. ca.* 22. *p.* 49. *London* 1660.

HARGRAVE in his notes upon *Emlyn's* preface, ſays, ſo abſurd and unreaſonable a practice was this, that even the ancients, among whom it was in uſe, had no good opinion of it, though it was certainly a practice of the ancient civil law, but is reprobated by *Grotius*, who approves of the omiſſion of it in England. *Ibid. Dig.* 49. *t.* 18. *Grotius Lett.* 693.

Yet it is clear, from the wording of the ſtatutes reſpecting confeſſions, in caſes of treaſon, "unleſs the "party ſhall willingly, and WITHOUT VIOLENCE confeſs "the ſame," that torture was practiſed in England; and the fact is corroborated by king JAMES the firſt, who in a book called, "King JAMES's *Premonition* to all chriſ-"tian princes and ſtates," ſays, "it was never uſed but "in caſes of high treaſon." *Edit.* 1609. *p.* 30. Vide *ca.* 6. *Ante* 15. *ca.* 6. *Ante* 37.

FOSTER conſiders this paſſage as accounting extremely well for the inſerting of the words "*without violence*," in the ſtatute of *Edw.* 6. but cannot, he ſays, ſo eaſily account for them in that of king *Will.* 3. *Foſ.* 244.

The State Trials affords another proof that the rack has been uſed in England to extort confeſſions. On the trials of the earls of ESSEX and SOUTHAMPTON, 43 *Eliz. Anno* 1600, for high treaſon, ſir *Edward Coke*, then attorney-general, in opening the caſe againſt the priſoners, ſays, "I cannot ſpeak without reverend commendations "of her majeſty's moſt honourable juſtice, yet I think "her over-much clemency to ſome, turneth to over-"much cruelty to herſelf; for though the rebellious at-"tempts were ſo exceedingly heinous, yet, out of her "princely mercy, no man was *racked*, *tortured*, or *preſſed* "to ſpeak any thing further than of their own accord "and willing minds." And this diſcovery *without torture*, he calls the *goodneſs of* GOD towards the queen, and

his

his juſt judgment upon the priſoners! A ſtrain of adulation, obſerves *Foſter*, to ſay no worſe of it, nauſeous and ſordid, highly unbecoming a gentleman of the profeſſion, eſpecially one that well knew, and hath informed his readers, that any kind of torture in that caſe would have been utterly illegal. 1 *St. Tr.* 199. *Foſ.* 244.

The paſſage in lord COKE, alluded to by FOSTER, is in the third Inſtitutes. Writing on impriſonment, *Coke* ſays, it appeareth that where the law requireth a perſon to be kept *in ſalva et arcta cuſtodia*, yet that muſt be *without pain* or *torment* to the priſoner, and upon this two queſtions ariſe, when, and by whom, the *rack* or *brake* in the tower of London was brought in. 3 *Inſt.* 35.

To the *firſt*—*John Holland*, earl of Huntingdon, was, by king *Henry* the ſixth, created duke of *Exeter*, and in the twenty-ſixth year of *Henry* the ſixth, the king granted to him the office of the conſtableſhip of the Tower. He, and *William de la Poole*, duke of *Suffolk*, and others, intended to have brought in the civil laws; for a beginning whereof, the duke of *Exeter*, being conſtable of the Tower, firſt brought into the Tower the *rack* or *brake*, allowed in many caſes by the *civil* law. And thereupon the *rack* is called *the duke of Exeter's daughter*. 3 *Inſt.* 35.

To the *ſecond*, upon this occaſion ſir JOHN FORTESCUE, chief juſtice of England, who wrote his book in commendation of the laws of *England*, and therein preferreth the ſame for the government of this country before the civil law, ſays particularly that all *tortures* and *torments* of parties accuſed, were directly againſt the common laws of *England*, and ſheweth the inconvenience thereof by fearful example. So as there is *no* law to warrant tortures in this land, nor can they be juſtified by any preſcription, being ſo lately brought in. 3 *Inſt.* 35. *Ante* 275.

Coke then quotes *Virgil*, deſcribing the iniquity of *Radamanthus*, that cruel judge of *Hell*—*Caſtigatque, auditque dolos, ſubigitque fateri.*

Firſt, he puniſhed before he heard; and, when he had heard his denial, he compelled the party accuſed to confeſs it. But far otherwiſe doth almighty GOD proceed, *poſt qua reus diffamatus eſt. Nunquid lex noſtra judicat, niſi*

niſi prius audierit ab ipſo. St. LUKE, *ca.* 16. *v.* 1. JOHN, *ca.* 7. *v.* 51.

TORTURE is alſo againſt MAGNA CHARTA. *Nullus liber homo, &c. aliquo modo deſtruatur, nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parvum ſuorum, aut per legem terræ.* *Ca.* 29.

All the ancient authors are againſt any pain or torment to be put or inflicted upon the priſoner, before attainder, or after attainder, but according to the judgment. And there is no one opinion in our books or judicial record, for the maintenance of torture or torments. 3 *Inſt.* 35.

Notwithſtanding theſe authorities, when *Felton*, upon his examination at the council board, declared as he had always done, that no man living had inſtigated him to the murder of the duke of *Buckingham*, or knew of his intention, *Laud*, biſhop of London, ſaid to him, "If "you will not confeſs you muſt *go to the rack*;" the man replied, "If it muſt be ſo, I know not who I may ac- "cuſe in the extremity of my torture—biſhop *Laud*, "perhaps, or any lord at this board." Sound ſenſe in the mouth of an enthuſiaſt and ruffian!

Laud having propoſed the rack, the matter was ſhortly debated at the board, and it ended in a reference to the judges, who, to the honour of the law, and of themſelves, unanimouſly reſolved, that the *rack* cannot be legally uſed. *Foſ.* 244. *Blackſ. Comm.* 321.

MONTAIGNE has conſidered this ſubject. He argues, that the putting men to the rack is a dangerous invention, and is rather a trial of patience than a criterion of truth. *Montaigne* ſays, both he who *has*, and he who has *not* the fortitude to endure pain, conceals the truth: for why ſhould torture ſooner make me confeſs what really is true, than force me to aſſert what is falſe. On the contrary, if he who is not guilty of the crime charged againſt him, has courage to ſuffer torments, why ſhould not he who is guilty, poſſeſs equal courage, when life is the reward? The ground of this invention proceeds from the conſideration of the force of conſcience: for conſcience, to the guilty man, ſeems to aſſiſt the rack in forcing him to confeſs his crime, and to ſhake

ſhake his reſolution, but on the other ſide, conſcience fortifies the innocent againſt torture. It is in truth a trial of uncertainty and of danger. What would not a man ſay—what would not a man do, to avoid intolerable torments? To this queſtion, by *Montaigne*, *Felton* gave the right anſwer, he would accuſe the innocent.

Etiam innocentes cogit mentiri dolor.

Pain, the moſt innocent will make to lie.

The man, whom the judge puts to the rack, that he may not die innocent, if *not* guilty, dies both *innocent* and *racked*. Thouſands have accuſed themſelves falſely.

The marquis BECCARIA, of Milan, has treated confeſſion by torture, in a moſt maſterly manner. He conſiders this infamous teſt of truth, a remaining monument of that ancient and ſavage legiſlation, in which trials by fire, by boiling water, or the uncertainty of combats, were called *judgments of GOD*; as if the links of the eternal chain, whoſe beginning is in the breaſt of the firſt cauſe of all things, could ever be diſunited by the inſtitutions of men. *Ca.* 16.

The only difference between torture, and trials by fire and boiling water, is, ſays *Beccaria*, that the event of the firſt depends on the will of the accuſed; and of the ſecond on a fact entirely phyſical and external, but this difference is apparent only, not real. A man on the rack, in the convulſions of torture, has as little in his power to declare the truth, as in the former to prevent, without fraud, the effects of fire or of boiling water. *Ibid.*

Every act of the will, is invariably in proportion to the force of the impreſſion on our ſenſes. The impreſſion of pain then may increaſe to ſuch a degree, that, occupying the mind entirely, it will compel the ſufferer to uſe the ſhorteſt method of freeing himſelf from torment. His anſwer, therefore, will be an effect, as neceſſary as that of fire or boiling water; and he will accuſe himſelf of crimes of which he is innocent. So that the very means employed to diſtinguiſh the innocent from the guilty, will moſt effectually deſtroy all difference between them. *Ibid.*

The

The reſult of *torture* then, is a matter of calculation, and depends on the conſtitution, which differs in every man, and is in proportion to his ſtrength and ſenſibility; ſo that to diſcover truth by this method is a problem which may be better ſolved by a mathematician than a judge, and may be thus ſtated. *The force of the muſcles, and the ſenſibility of the nerves of an innocent perſon being given, it is required to find the degree of pain neceſſary to make him confeſs himſelf guilty of a given crime.* *Ibid.*

The examination of the accuſed is intended to find out the truth, but if this be diſcovered with ſo much difficulty in the air, geſture, and countenance, of a man at eaſe, how can it appear in a countenance diſtorted by the convulſions of torture? every violent action deſtroys thoſe ſmall alterations in the features, which ſometimes diſcloſe the ſentiments of the heart. *Ibid.*

Some civilians, and ſome nations, permit the *petitio principii* to be only three times repeated, and others leave it to the diſcretion of the judge: therefore, of two men equally innocent or equally guilty, the moſt robuſt and reſolute will be acquitted, and the weakeſt and moſt puſillanimous will be condemned, in conſequence of the following excellent method of reaſoning. "*I, the judge,* "*muſt find ſome one guilty. Thou who art a ſtrong fellow* "*haſt been able to reſiſt the force of torment; therefore I ac-* "*quit thee. Thou being weaker has yielded to it; I therefore* "*condemn thee. I am ſenſible that the confeſſion which was* "*extorted from thee has no weight; but if thou doſt not con-* "*firm by oath,* (which was always required) *I will have* "*thee tormented again.*" *Becc. ca.* 16. 51.

A very ſtrange but neceſſary conſequence of the uſe of *torture* is, that the caſe of the innocent is *worſe* than that of the guilty. With regard to the firſt, either he confeſſes the crime which he has not committed and is condemned; or he is acquitted, and has ſuffered a puniſhment he did not deſerve. On the contrary, the perſon who is really guilty, has the moſt favourable ſide of the queſtion, for if he ſupport the torture with firmneſs and reſolution, he is acquitted, and has gained having changed a greater puniſhment for a leſs. *Ibid.*

The

The law by which torture is authorized ſays, *Men be inſenſible to pain—Nature has indeed given you an irreſiſtible ſelf-love, and an unalienable right of ſelf-preſervation; but I create in you a contrary ſentiment, an heroical hatred of yourſelves. I command you to accuſe yourſelves, and to declare the truth, midſt the tearing of your fleſh, and the diſlocation of your bones.* Ibid.

Torture is uſed to diſcover whether the criminal be guilty of other crimes beſides thoſe of which he is accuſed, which is equivalent to the following reaſoning—*Thou art guilty of one crime, therefore it is poſſible that thou mayſt have committed a thouſand others; but the affair being doubtful, I muſt try it by my criterion of truth. The laws order thee to be tormented, becauſe thou mayſt be guilty, and becauſe I chuſe thou ſhouldſt be guilty.* Ibid.

Torture is uſed to make the priſoner diſcover his accomplices; but if it has been demonſtrated that it is not a proper means to diſcover truth, how can it ſerve to diſcover the accomplices, which is one of the truths required? will not the man who accuſes himſelf yet more readily accuſe others? beſides, is it juſt to torment one man for the crime of another? may not the accomplices be found out by the examination of the witneſſes, or of the criminal; from the evidence, or from the nature of the crime itſelf; in ſhort, by all the means that have been uſed to prove the guilt of the priſoner. Accomplices generally fly when their comrade is taken. The uncertainty of their fate condemns them to perpetual exile, and frees ſociety from the danger of further injury, whilſt the puniſhment of the criminal, by deterring others, anſwers the purpoſe for which it was ordained. *Beccar. ca.* 16. *p.* 51, 52, 53.

BLACKSTONE, with his uſual preciſion and perſpicuity, adopts the ſentiments and arguments of the humane and elegant BECCARIA. The commentator on the common law of England, thus argues againſt the inhumanity and weakneſs of the civil code in procuring *confeſſion* by the *rack*. It ſeems, he ſays, aſtoniſhing that this uſage of adminiſtering the *torture*, ſhould be ſaid to ariſe from a *tenderneſs* to the lives of men: yet this is the reaſon given for its introduction in the civil law, and its ſubſequent

adoption by the French and other nations, *viz.* because the laws cannot endure that any man ſhould die, upon the evidence of a falſe or even a ſingle witneſs; and therefore contrived this method, that innocence ſhould manifeſt itſelf by a ſtout denial, or guilt by a plain confeſſion! Thus rating a man's virtue by the hardineſs of his conſtitution, and his guilt by the ſenſibility of his nerves! But there needs only to ſtate accurately, in order moſt effectually to expoſe this inhuman ſpecies of mercy; the uncertainty of which, as a teſt and criterion of truth, was long ago pointed out by TULLY; though he lived in a ſtate wherein it was uſual to torture *ſlaves* (but not freemen) in order to furniſh evidence: *Tamen*, ſays he, *illa tormenta gubernot dolor, moderatur natura cujuſque tum animi tum corporis, regit quæſitor, flectit libido, corrumpit ſpes, infirmat metus; ut in tot rerum anguſtiis nihil veritati loci relinquatur.* *Pro Sulla* 28. *Cod. l.* 9. *t.* 41.—*l.* 8. *t.* 47.—*l.* 16. 4 *Blackſ. Comm.* 321.

CHAPTER XXVII.

In what caſes the Examinations or the Declarations of Priſoners, and the information of Witneſſes, taken out of Court, whether before the Coroner or Juſtice of the Peace, may be read in evidence againſt a Priſoner on his Trial, under the rules of the Common Law, or purſuant to Statutes.

[VIDE *Ca.* 6. *Anté* 37.]

NOTE. It has been already laid down, that at common law, in caſes of life, no evidence is to be given againſt a priſoner but in his preſence. 2 *Hawk. P. C. ca.* 46. Vide *Chap.* 4. *Ante* 14.

Rule the Firſt.

IN caſes of miſdemeanors, an examination taken before a magiſtrate, *ex parte*, cannot, either at common law

law or by ſtatute, be given in evidence on the trial of the defendant. Vide, *the laſt rule in this chapter. Poſt*

As in the KING, *v.* PAINE, *Hill.* 7 *Will.* 3. it was determined by the court of king's bench, with the concurrence of the common pleas, that the depoſition of witneſſes, taken *ex parte* before a magiſtrate, on an examination concerning a miſdemeanor, cannot be read in evidence on the trial of the party for ſuch miſdemeanor, after the death of the deponents, becauſe as the defendants was not preſent before the magiſtrate when they were taken, he had no opportunity to croſs examine them. 5 *Mod.* 165. 2 *Salk.* 417, 418. 3 *Term. Rep.* 723. Vide *ca.* 4. *Ante* 14.

But in the KING, *v.* BUCKWORTH, *Mich.* 20 *Car.* 2. for perjury, before KELYNG, C. J. and TWISDEN, and MORTON, J's. A witneſs was produced to prove, what a perſon deceaſed had ſworn at the former trial in ejectment; and this was allowed to be good evidence, becauſe it doth not go to the proof of the charge itſelf that the defendant ſwore, but only to the *falſity* of the *fact* that was ſworn. And it was held that the charge itſelf, which conſiſts in the truth of the proof of the fact, and the certainty of what the defendant ſwore, might be directly proved in evidence, which might be croſs-examined by the defendant; but that the falſity of the fact to which the defendant ſwore, may be made out by any other proof, becauſe in this caſe you may give the verdict in evidence to prove the perjury; in as much as the cauſe in which the perjury was committed, muſt be ſet forth in the information or indictment, and of conſequence be proved on the iſſue. And when you prove that the defendant ſwore in the cauſe, you may ſhew the whole matter, *viz.* how his evidence ſtood expoſed by the party deceaſed. *Sir Thom. Raym.* 170. *Gilb. Evid. by Loft,* 214.

Rule the Second.

As in caſes of life, no evidence is to be given againſt the priſoner except in his preſence: of courſe, previous to the enacting (in *England*) of the ſtatutes of *Philip*

and *Mary*, (and in *Ireland*) the ſtatute of 10 *Charles* 1. a depoſition taken before a juſtice of the peace where the felony was committed, was not admiſſible evidence on the trial of the party, even though the witneſs died, or was unable to travel. *Ante* 14.

The ſtatutes above referred to, enact—

Firſt, "That *juſtices of the Peace*, when any perſon is "brought before them for manſlaughter, or felony, or "ſuſpicion of manſlaughter or felony, being bailable by "law, ſhall before any bailment or main prize, take the "examination of the ſaid priſoner, and the *information* "of them that bring him, of the fact and circumſtance "thereof, and the ſame or as much as may be material "thereof, to prove the felony, ſhall be put in writing "before they make the ſame bailment, which ſame exa-"mination, together with the ſaid bailment, the ſaid "juſtices ſhall certify, at the next general gaol delivery, "to be holden within the limits of their commiſſion." *Stat.* 1 *and* 2 *Phil. & Mar. ca.* 13. *ſ.* 4. *Iriſh*, 10 *Car.* 1. *ca.* 18. 2 *Stat. at large*, 75.

Secondly, It is alſo enacted, "That every *coroner*, upon "any inquiſition before him found, whereby any perſon "or perſons ſhall be indicted for murder or manſlaugh-"ter, or as acceſſary or acceſſaries to the ſame, before "the murder or manſlaughter committed, ſhall put in "writing the effect of the evidence given to the jury "before him being material; and as well the ſaid juſ-"tices, as the ſaid coroner, ſhall bind all ſuch by re-"cognizance as do declare any thing material, to prove "the ſame, to appear at the next general gaol delivery, "and ſhall certify as well the ſame evidence as the re-"cognizance in writing." 2 *and* 3 *Phil. & Mar. ca.* 13. *ſect.* 4. *Iriſh*, 10 *Car.* 1. *ca.* 18. 2 *Stat. at large*, 75.

Thirdly, It is further enacted, "That the ſaid juſtice, "or juſtices, before he or they ſhall commit, or ſend "ſuch priſoner to ward, ſhall take the examination of "the priſoner, and the *information* of thoſe who bring "him, and ſhall put the ſame in writing within two "days after the ſaid examination, and the ſame ſhall "certify in ſuch manner and form, and at ſuch time as "they ſhould and ought to do, if ſuch priſoner ſo com-

"mitted

"mitted or ſent to ward had been bailed, &c." *Stat. 2 and 3 Phil. & Mar. ca.* 10.

NOTE. Theſe ſtatutes, which were enacted in Ireland in 1634, give to the magiſtrate the ſame juriſdiction in charges of *treaſon*, as in *felony* or *manſlaughter*: but when they were paſſed, *murder* was *treaſon* in Ireland, at preſent it is not.

From theſe acts of the legiſlature ſeveral rules have ſprung, derogatory to the ancient common law: and theſe rules were ſettled by the judges, and received as law by the houſe of lords of England, *anno* 1666.

At that period, previous and preparatory to the trial of lord MORLEY, in the LORDS, for murder, 18 *Car.* 2. The JUDGES were called upon and delivered their opinions on certain points ſubmitted to them, which opinions may now be conſidered as the baſis of certain rules of evidence, applicable to the preſent ſubject. The JUDGES were, KELYNG, C. J. *B. R.* ſir ORLANDO BRIDGMAN, C. J. C. P. ſir MATTHEW HALE, C. B. and ATKYNS, TWISDEN, TYRRELL, TURNER, BROWN, WYNDHAM, ARCHER, RAINSFORD, and MORTON, juſtices. They reſolved,

Rule the Third.

That in caſe any of the witneſſes which were examined before the coroner, were *dead*, or *unable* to *travel*, and oath made thereof, that then the examination of ſuch witneſs, ſo dead, or unable to travel, might be read, the coroner firſt making oath that ſuch examinations are the ſame which he took upon oath, without any addition or alteration whatſoever. 7 *St. Tr.* 421. *Kelyng* 55. *S. C. Ante ca.* 6. *p.* 37.

Rule the Fourth.

That in caſe oath ſhould be made that any witneſs, who had been examined by the coroner, and was then *abſent*, was detained by the means or procurement of the priſoner, if the court be ſatisfied by the evidence they have heard, that the witneſs was detained by the means

or procurement of the priſoner, then the examination might be read, but whether he was detained by the means or procurement of the priſoner was matter of fact. *Ibid.*

Rule the Fifth.

That if a witneſs, who is examined by the coroner be *abſent*, and oath is made that the proſecutors have uſed all their endeavours to find him, that is not ſufficient to authorize the reading of ſuch examination. *Ibid.*

Theſe rules are cited, and fully adopted by HAWKINS, and other authorities. 2 *Hawk. P. C. ca.* 46. 2 *Hale P. Cr.* 284. *Sum.* 262, 263. *Kelyng* 55. 1 *Lev.* 180. 2 *Keb.* 19. *Dalt.* 111, 112, 113.

On the trial of lord MORLEY, the eſpecial point on which the JUDGES had formerly reſolved aroſe.

Mr. ſolicitor-general FINCH deſired the depoſitions of ſome witneſſes, taken before the coroner, who was ſince dead, to be read, which the priſoner oppoſed, deſiring that no evidence might be given againſt him, but face to face.

The lord high ſteward (lord CLARENDON, chancellor) demanded the opinion of the JUDGES, who by KELYNG, C. J. anſwered, that upon proof made, that the witneſſes were dead, and oath by the coroner that the depoſitions were unaltered, they ought to be read. Which was done. 7 *St. Tr.* 424.

Maynard, ſerjeant, deſired that the depoſitions of a material witneſs, taken at the coroner's inqueſt, who had now abſented himſelf, ſo that they could not find him, might be read.

Lord *Morley*, the priſoner oppoſed it, and the opinion of the JUDGES being required, the *lord chief juſtice* anſwered, that if the court upon any evidence were ſatisfied, that the witneſs was withdrawn by the procurement of the priſoner, the depoſition ought to be read, otherwiſe not—whereupon,

Thomas Hardy depoſed, that *Thomas Snell*, his apprentice, was lately run away from him, and that his fellows

ſaid,

ſaid, he told them before he went away, that lord *Morley*'s trial was to be ſhortly, but he would not be there.

The court not thinking this evidence ſufficient, the depoſitions were not read. *Ibid.*

In lord NETTERVILLE's caſe, before the lords of Ireland, 17 *Geo.* 2. Indictment for murder.

The counſel for the crown produced the *capias*, *alias* and *plures*, that iſſued upon an indictment, found againſt *Nicholas*, lord viſcount *Netterville*, of New-grange, in order to introduce the reading of the examinations of *Owen Whelan* and *Edward Buckley*, who were *dead*, to the reading of which writs the priſoner objected. On hearing counſel on each ſide and debating the point, it was reſolved, the *writs* ſhould not be read; and on a ſecond queſtion being debated and put, *viz.* whether the examinations of *Owen Whelan*, which had been taken *ex parte*, before the coroner, ſhould be read, he being dead, it was reſolved unanimouſly that it ſhould not. 3 *Lords Journ. of Ireland* 538.

The laſt rule is illuſtrated in a civil caſe, BENSON, *v.* OLIVE, *exchequer*, *Michaelmas*, 5 *Geo.* 2.

This was the trial of an iſſue directed to the court of exchequer, the depoſition of a witneſs, who had been examined in 1672, was offered to be read, without any evidence of his being dead, relying on the preſumption from length of time, which would entitle the reading of a deed of that date.

REYNOLDS, C. B. refuſed to let it be read, ſaying a deed had ſome authenticity, from the ſolemnity of hand and ſeal. But if proper ſearches or inquiry had been made, and no account could be given of him, he would have admitted it at ſuch a diſtance of time. 2 *Stra.* 920.

BULLER, J. *B. R.* recognized as law, the rules in the caſe of lord *Morley*. He ſays, if due diligence be uſed, and it is made manifeſt (by evidence) that the deponent has been fought for and cannot be found; or if it be proved, that a witneſs was ſubpœnaed and fell ſick by the way, it is ſaid that his depoſition may be read, for that in ſuch caſe he is in the ſame circumſtances as to

the

the party that is to use him, as if he were dead. *Bull Nis. Pri.* 239.

Rule the Sixth.

Where witnesses cannot be produced *viva voce*, by reason of death, sickness, or absence by procurement, their depositions may be read *for* as well as *against* a prisoner, on a trial for high treason: but not where they might have been produced in person. 2 *Hawk. ca.* 46. 1 *St. Tr.* 723.

This rule, so far as it respects the depositions of a dead witness, appears to have been fully argued and settled, in the KING, *v.* WESTBEEN, *Old-Bailey sessions, January*, 1739.

The prisoner was indicted for larceny: the question argued was, whether the information of *Curtres Lulham*, an accomplice, deceased, taken in writing, upon oath, against the prisoner, before LEE, C. J. pursuant to the statutes of *Philip & Mary*, should be received in evidence?

Sir *Dudley Ryder*, attorney-general, after proving the fact of *Lulham*'s death, insisted upon reading these depositions, made before the chief justice, as evidence against the prisoner.

Serjeants *Hayward* and *Barnardiston*, opposed their being read, and contended that as the act of GOD, which the law says shall not work an *injury* to any man, had by *Lulham*'s death deprived the crown of the opportunity of producing him *viva voce*, the admitting his deposition to be read in evidence would *injure* the prisoner, in as much as he would lose the benefit which might otherwise have arisen from a cross-examination.

The attorney-general, and *Strange*, solicitor-general, replied, and the point was very much debated, But,

COMYNS, C. B. and CHAPPEL, J. over-ruled the objection, and admitted *Lulham*'s information to be read; though they said it would not be conclusive unless it were strongly corroborated by other testimony. *Leach's Cr. Ca.* 2 *Edit.* 12. 3 *Edit.* 15. And vide the *King*, *v. the Inhabitants of Erifwell.* 3 *Term. Rep.* 712. *Ante ca.*

The

The KING, *v.* HENRIETTA RADBOURNE, *Old-Bailey, July ſeſſion*, 1787, ſupports the rule, that depoſitions, judicially taken, and proved to the court, purſuant to the ſtatute of *Philip & Mary*, may be read in evidence after the death of a witneſs.

The priſoner was tried for the murder of her miſtreſs, *Hannah Morgan*. The deceaſed, while languiſhing under ſeveral wounds, which proved mortal, was examined by two magiſtrates, who, in the *preſence* of the priſoner, took down her depoſition, in writing, ſtating in ſubſtance the circumſtances of the aſſault and battery under which ſhe ſuffered. The whole of theſe examinations, one of the magiſtrates declared on his oath was heard by the priſoner, that they were diſtinctly read over to her in the preſence of the deceaſed, who ſigned them, that they contained a correct account of what ſhe ſaid, and that he ſigned them as having been taken before him as a magiſtrate for the county where the fact was perpetrated.

Garrow, for the proſecution, contended, that Mrs. *Morgan*'s depoſition was admiſſible in evidence on two grounds. *Firſt*, as the *declaration* of a perſon who had received a mortal wound from the hand of a murderer, and who was, at the time the declaration was made, lingering under a well-founded apprehenſion, that her life was in imminent danger. Vide *Ante ca. confeſſion.*

Secondly, that it was admiſſible as an information, taken by a magiſtrate under the ſtatute of *Phil. & Mary*, for it had been given in the *preſence* and *hearing* of the priſoner, upon an oath lawfully adminiſtered to the deceaſed, who had thereby called GOD to witneſs, that what ſhe ſaid was true; and who had, in the preſence of the priſoner, made an additional atteſtation of its truth, by putting her ſignature thereto: for that any thing that was ſaid, either by a proſecutor, a priſoner, or a witneſs, in the preſence and hearing of each other, although ſaid in common converſation and under no ſolemnity, was admiſſible evidence in all courts, both criminal and civil; and the circumſtance of Mrs. *Morgan*'s teſtimony before the magiſtrate, in the preſence of the priſoner, having been *reduced into writing*, inſtead of deſtroying its admiſſibility rendered it more eligible, in as much as what

was ſaid was thereby rendered more certain and leſs liable to be miſtaken. *Ante* 14.

The COURT received the depoſition as evidence, referring to the JUDGES among other queſtions, this queſtion, whether the information of *Hannah Morgan* was admiſſible, and they held it was. *Leach Cr. Ca.* 3 *Edit.* 512.

Rule the Seventh.

The evidence of a witneſs, given *viva voce*, in the preſence of the priſoner on trial, may, at the deſire of the priſoner, be compared with the facts which ſuch witneſs has previouſly ſworn to in his depoſitions before a juſtice of the peace, in order, by compariſon, to ſee whether he has varied in his teſtimony. 1 *St. Tr.* 723.

This rule is founded on principles of juſtice; and ſhews, that the priſoner is intitled to the ſame evidence for his defence, as the crown is for his conviction. And ſince the abrogation of that inhuman exemption, derived from the civil law, which denied to the priſoner the privilege of examining witneſſes in his defence, as was the caſe, until the grievance was removed by ſtatute: it has been held, that the priſoner is intitled to the benefit of every ſpecies of evidence as fully as the crown. *Stat.* 1 *Mar. ſtat.* 1. *ca.* 1. *Iriſh*, 9 *Ann. ca.* 6. *ſec.* 6. *Stat. at large*, *vol.* 4. 263. 4 *Blackſ. Comm.* 353.

The laſt rule is illuſtrated in the caſe of lord STAFFORD, tried for high treaſon before the LORDS, at *Weſtminſter*, *anno* 1680. 32 *Car.* 2.

In this caſe it was admitted, that the depoſitions taken from a witneſs, before a juſtice of the peace, might, at the priſoner's deſire, be read on the trial, in order to take off the credit of the witneſſes, by ſhewing a *variance* between ſuch depoſitions, and the *viva voce* evidence given in court. 2 *Hawk. Pl. Cr. ca.* 46. 3 *St. Tr.* 130 *to* 136.

NOTE. It is not the practice in the inferior courts to *read* ſuch depoſitions, or give copies of them, at the deſire of the priſoner; but for the JUDGE to look into them and compare the facts they contain with the parol evidence

evidence given by the witneſs to the jury. And the reaſons aſſigned for refuſing to read them out, or give copies is, that the depoſitions often contain the names of offenders not on trial, or not in cuſtody, and alſo facts which do not relate immediately to the priſoner, but to others implicated in the offence, the diſcloſure of which might tend to the prevention or impeding of public juſtice, by warning ſuch offenders to fly, and by revealing the evidence of the crown, intended to be uſed on their proſecutions.

Rule the Eighth.

It is now alſo agreed, that where a witneſs at a ſubſequent trial, varies from his own evidence, given on a former trial, in relation to the ſame matter, ſuch variance may be given in evidence to invalidate his teſtimony on the latter trial. 2 *Hawk. P. C. ca.* 46.

In the KING, *v.* RICHARD LANGHORN, eſq; *Old-Bailey, anno* 1679, 31 *Car.* 2. before NORTH and SCROGGS, C. J's. Several witneſſes were called, and admitted to impeach the teſtimony of *Titus Oates*, by ſhewing a variance in his teſtimony.

And in conſequence of his evidence, Mr. *Langhorn*, the priſoner, in his defence ſubmitted to the court, that if he had proved any one point, in anſwer to that which *Oates* had given in evidence not to be true, then he ought to be ſet aſide; and he pointed out the ſeveral variances in the evidence given by the impeached witneſs. Vide the *King*, v. *Finney*. *Ante* 4.

The evidence however was admitted, but its effect was done away by the court.

The CHIEF JUSTICE ſaid, they were all *papiſts*, and in a general cauſe; and in his charge obſerved, that though the witneſſes were ſtrangers to *Oates*, they were not ſtrangers to the errand they came about. "*They* came," ſaid his lordſhip, "to defend all the Roman catholics, "whom *we* would hang here for a plot, and they are "ſent over for that purpoſe, as far as their teſtimony "can go. But," he added, "how far that is, though "they are not upon their oaths, (for the law will not

" permit it) I muſt ſay to you in favour of the priſoner " at the bar, as I did to the jury yeſterday, you muſt " not take it therefore as if it were mere talk and no " more, nor reject them too much becauſe they did not " ſwear; they would ſwear 'tis likely, if the law would " allow it." 2 *St. Tr.* 906, 907.

NOTE. Compare this caſe to that of the KING, *v.* FINNEY, and the improvement of the law in favour of the ſubject, upon trials for crimes, by the admiſſion of witneſſes on oath, and the conſtruction on evidence rendered doubtful, by the proof of contrary facts, and the merciful charges of the judges in ſuch caſes muſt create the moſt pleaſing ſenſation and confidence in every man, who is a friend to that pure adminiſtration of juſtice, which is the ſtrongeſt protection to political freedom and ſocial happineſs. Vide *Ante* 4.

Rule the Ninth.

Though juſtices of the peace cannot hear and determine treaſon, by virtue of their commiſſion of the peace, nor take an indictment of that offence, yet they may receive examinations and informations on charges of treaſon of the parties brought before them, and certify them as directed by the ſtatute of *Phil. and Mary.* 1 *Hale P. C.* 305.

Rule the Tenth.

And ſuch informations or depoſitions of a witneſs, being taken in writing upon oath, adminiſtered by a juſtice of the peace as they ought to be, and being certified to the gaol delivery, may be read in evidence againſt the defendant, not only if the informant be dead, but if he be unable to travel, and ſworn ſo to be. 1 *Hale P. C.* 305. 2 *Hale P. C.* 284. Vide *Similar rule in reſpect to informations before the coroner. Ante* 285.

HALE ſays, ſome have been of opinion, that if the witneſs was bound over and appear not, the informations may be read, which ſeems to be queſtionable. *Ib.*

Rule the Eleventh.

In the caſe of informations or depoſitions, taken before a juſtice of the peace, the rule by which they are admitted as evidence, is the ſame as in admitting confeſſions judicially taken, purſuant to the ſtatutes; that is, oath muſt be made on the trial, either by the juſtice or by the coroner, or the clerk who wrote them, that they are the true ſubſtance of what the informer or other witneſs gave upon oath, when examined. Vide *Ante ca.* 6. *p.* 41. *Rule* 6.

Rule the Twelfth.

And in ſuch caſe, information upon oath, taken before juſtices of the peace of one county, may be tranſmitted before juſtices of gaol delivery of that county where the offence was committed; that is to ſay, if the offender were brought before that juſtice, *quære tamen*, becauſe the offence was out of his juriſdiction. 1 *Hale P. C.* 305, 306. Yet ſee *Dalton, ca.* 111. *p.* 299. accordant. *New Ed. ca.* 164. *p.* 554.

Rule the Thirteenth.

But depoſitions of a witneſs taken by the coroner, or informations taken before juſtices of the peace and certified to the gaol delivery, purſuant to the ſtatutes of *Philip and Mary*, are not evidence whereon to ground a conviction for petit treaſon, if the party be living though unable to travel, or kept out of the way by the priſoner, or by his procurement. *Foſ.* 337.

The above rule, taken from the opinion of *Foſter*, is grounded on *ſtat.* 5 *Edw.* 6. *Engliſh*, which never was enacted in *Ireland.*

Rule the Fourteenth.

But it hath been adjudged, that depoſitions taken before a *coroner*, upon an inquiſition of death, *ſuper viſum corporis*, cannot be given in evidence upon an appeal for the ſame death; becauſe it is a different proſecution from that

that wherein they were taken. 2 *Hawk. P. C. ca.* 46. 2 *Roll.* 460, 461. 1 *Siderf.* 325. 2 *Keb.* 384.

There are many inſtances in the reigns of queen *Elizabeth* and *James* the firſt, wherein the depoſitions of abſent witneſſes were *allowed* ae evidence in *treaſon* and *felony*, even where it did not appear but that they might have been produced *viva voce*. 2 *Hawk. P. C. ca.* 46.

Hiſtory, and alſo the State Trials, the moſt authentic and ſatisfactory records of the temper and politics of the times, verify the above obſervation. For example:

In the duke of NORFOLK's caſe, high treaſon, 1546. 37 *Hen.* 8.

THOMAS's caſe, 1 *Mary*. *Dyer* 99, 100. *Ante* ABINGTON's caſe, who with *Tilney*, *Jones*, *Travers*, *Chanock*, *Bellamy* and *Gage*, were tried for high treaſon. 15 *Sept.* 1586. 2 *Eliz.*

In this caſe the confeſſions of *Babington* and others, who had been attainted of treaſon, were read in evidence againſt the priſoners. 1 *St. Tr.* 134, 135.

UDDAL's caſe, tried on *ſtat.* 13 *Eliz. ca.* 2. *Croydon aſſizes*, 1590, 13 *Eliz.* for feloniouſly writing and publiſhing a ſeditious and ſcandalous libel, called "the De- "monſtration of Diſcipline." 1 *St. Tr.* 168, 172.

The earl of ESSEX's caſe, before the LORDS, *Weſtminſter*, 1600, 43 *Eliz.* for high treaſon. The examination of *Witherington*, not taken in the preſence of the earl, was read againſt him. 1 *St. Tr.* 198, 200.

Sir WALTER RALEIGH's caſe, at a *commiſſion of oyer and terminer*, at *Winton*, 1603. 1 *Jac.* 1.

In this caſe POPHAM, C. J. ANDERSON, GAWDIE, and WARBURTON, J's. ſat as judges, and ſir *Edward Coke* proſecuted as attorney-general: the examination of lord *Cobham* was offered in evidence againſt the priſoner, to the admiſſion of which ſir *Walter* objected, he deſired lord *Cobham* might be produced and ſworn, and obſerved, that the examination was neither ſubſcribed nor avouched by his lordſhip. Lord *Cecil*, one of the commiſſioners, anſwered, "It is the accuſation of lord *Cobham*, it is the "evidence againſt you, muſt it not be of force without "his ſubſcription? I deſire to be reſolved by the judges, "whether

" whether by the law it is not a forcible *argument* of " evidence?"

The JUDGES answered, " My lord it is!"

Raleigh replied, " The king, at his coronation, is " ſworn, *in omnibus judiciis ſuis æquitatem, non rigorem* " *legis obſervare.* By the rigour and cruelty of the law " it may be a forcible evidence." The *lord chief juſtice* then told him, " This is not the rigour of the law, but " the juſtice of the law; elſe, when a man hath made " a plain accuſation, by practice, he might be brought to " retract it again." And the examination of *Cobham*, and ſeveral others were then read! 1 *St. Tr.* 211, 219.

In lord AUDLEY's caſe, before the LORDS, for a rape on his wife, &c. 7 *Car.* 1. The counteſs's examination was read againſt the earl. 1 *St. Tr.* 388.

The doctrine and practice held out and followed in the above caſes, by the officers of the crown, in the reigns of the *Tudors* and *Stewarts*, and received as law by the judges acting under the influence of the court, and holding their places, as they then did, *durante bene placito*, is ſtrongly reprobated by *Foſter*, who conſiders the reading of the State Trials, in thoſe reigns, as " doing ſo much penance." *Foſ.* 234.

Neither have thoſe records of oppreſſion paſſed unnoticed in Ireland. In the KING, *v.* PETER FINNERTY, indicted for a libel, at a *commiſſion of oyer and terminer*, *Dublin*, *Dec.* 1797, 38 *Geo.* 3.

Curran, of counſel for the defendant, adverting to the proſecutions of former times, when the true principles of juriſprudence were perverted; and when accuſation inſured conviction, addreſſed the jury thus:— " Does hiſtory give you a ſingle inſtance in which the " ſtate has been provoked to theſe conflicts, except by " the fear of truth, and by the love of vengeance?— " Do you read that *Elizabeth* directed any of thoſe ſtate " proſecutions againſt the libels which the divines of " her times had written againſt her catholic ſiſter, or " againſt the other libels which the ſame reverend gen- " tlemen had written againſt her proteſtant father?— " No—we read of no ſuch thing; but we know ſhe did " bring forward a proſecution from motives of perſonal " reſentment,

" reſentment, and we know that a *jury* was found time-
" ſerving and mean enough to give a verdict, which ſhe
" was aſhamed to carry into execution. The learned
" counſel drew you back to the times that have been
" marked by theſe miſerable conflicts. You have been
" carried back to the ſtate proſecutions of former years,
" were they inſtituted to promote the welfare of the
" country? Or was it when the government was ſinking
" under the crumbling ruins of the falling empire it-
" ſelf? when the temples of juſtice were prophaned
" with the convictions of a *Ruſſell* and a *Sidney!* I ſee
" you turn your thoughts to the reign of the ſecond
" *James*, I ſee, you turn your eyes to thoſe pages of
" governmental abandonment, of popular degradation,
" of expiring liberty, of mercileſs and ſanguinary per-
" ſecution—when language died away in the hearts of
" the people—when humanity had no ear, becauſe
" liberty had no tongue—to that miſerable period, in
" which the fallen and the abject ſtate of man might
" have almoſt been an argument in the mouth of the
" atheiſt and of the blaſphemer, againſt the exiſtence of
" an all-juſt and all-wiſe cauſe—if the dying fury of the
" *Stewarts* had not prepared the glories of thoſe patriots
" who eſtabliſhed the Revolution, and thereby refuted
" the impious inference, by ſhewing that if man de-
" ſcends, it is not in his own proper motion—that it is
" with labour and with pain, and that he can continue
" to ſink only, until by the force and preſſure of the
" deſcent, the ſpring of his immortal faculties acquires
" that recuperative energy and effort which hurries him
" as many miles aloft." *Finnerty's trial, MS. by Lea, Mac Nally, jun. and the trial by Ridgeway*, 62, 63.

Rule the Fifteenth.

But though the depoſitions of a witneſs, taken by a juſtice of the peace in the preſence of the priſoner, purſuant to the ſtatute of *Philip and Mary*, is admiſſible evidence on the trial of the priſoner; yet if they be not judicially taken as the ſtatutes direct, they cannot be read. 2 *Hawk. P. C. ca.* 46. 13 *Edw.* 4. 3.

As

As in the KING, *v.* WILLIAM WOODCOCK, *Old-Bailey, January ſeſſions*, 29 *Geo.* 3, 1789.

The priſoner was indicted before EYRE, C. B. ASHURST, J. and ADAIR, recorder of *London*, for the wilful murder of *Sylvia Woodcock*, his wife.

It appeared in evidence, that the deceaſed was found in a ditch, and had received eight wounds. She was ſo exhauſted by loſs of blood as to be apparently dead, but recovering her ſenſes, Mr. *Read*, a magiſtrate, attended her at the poor-houſe, and found her in a ſtate of perfect recollection.

He told her he was a magiſtrate come to take her examinations, and admoniſhed her to ſpeak the truth, and as ſhe appeared ſenſible of the impiety and dangers of falſehood he *adminiſtered an oath to her*, and received her information, which he reduced in her own words into writing. He afterwards read this information over to her with great deliberation, and gave it to her to ſign, and ſhe made her mark on the paper in approbation of its contents. The magiſtrate then ſigned it himſelf, and being proved on the trial, it was read in evidence.

It alſo appeared from the evidence of the ſurgeons, that ſhe died in about eight and forty hours after the examination had been taken, and that it was impoſſible from the firſt moment that ſhe could live long; but that although ſhe retained her ſenſes to the laſt moment, and repeated the circumſtances of the ill uſage ſhe had received, ſhe never expreſſed any apprehenſion or ſeemed ſenſible of her approaching diſſolution.

The evidence of the *information*, or *declarations* of the deceaſed, was of a very preſſing and urgent nature againſt the priſoner.

The COURT on theſe circumſtances, took into conſideration this queſtion, "Whether the evidence which "had been obtained from the deceaſed, could legally "be left with the jury?"

EYRE, C. J. therefore ſtated the caſe to them, independent of that evidence, and then delivered his opinion on the admiſſibility of the examination, to the following effect:

Great as a crime of this nature *(murder)* muſt always appear to be, yet the inquiry into it muſt always proceed upon the rules of evidence.

The moſt common and ordinary ſpecies of legal evidence, conſiſts in the depoſitions of witneſſes taken *on oath*, before the jury in the face of the court, in the preſence of the priſoner, and received under all the advantages which examination and croſs-examination can give.

But beyond this kind of evidence there are alſo two other ſpecies, which are admitted by law.

The one is the *dying declaration* of a perſon who has received a fatal blow. The other is the *examination* of a priſoner, and the *depoſitions* of the witneſſes who may be produced againſt him, taken officially before a juſtice of peace, by virtue of a particular act of parliament, which authorizes magiſtrates to take ſuch examinations, and directs that they ſhall be returned to the court of gaol delivery.

This laſt ſpecies of depoſition, if the defendant ſhould die between the time of examination and the trial of the priſoner, may be ſubſtituted in the room of that *viva voce* teſtimony which the deponent, if living, could alone have given, and is admitted of *neceſſity*, as evidence of the fact.

In the preſent caſe, a doubt has ariſen with the court, to which doubt I entirely ſubſcribe; whether the examination of the deceaſed, taken in writing at the poor-houſe by Mr. *Read*, the magiſtrate, is an examination of the nature I have deſcribed?

It was not taken as the ſtatute directs, in a caſe where the priſoner was brought before him in cuſtody; the priſoner therefore had no opportunity of *contradicting the facts it contains*. It was not in that part of Mr. *Read*'s duty, by which he is, on hearing the witneſſes, to bail or commit the priſoner; but it was a *voluntary* and *extra-judicial act*, performed at the requeſt of the overſeers; and although it was a very proper and prudent act, yet being voluntary and under circumſtances where the juſtice was not authorized to adminiſter an oath, it cannot be admitted before a jury as evidence; for no evi-

dence

dence can be legal, unleſs it be given upon oath judicially taken. *Leach's Cr. Caſ.* 2 *Edit.* 397. 3 *Edit.* 563. But the above depoſition was read, as the dying declaration of the party who made it. *Ante* 37.

In the KING, *v.* DINGLER, *Old-Bailey, September ſeſſ.* 1791, before GOULD, J. the ſame point occurred. This was an indictment for murder. Mr. *Addington*, a juſtice of the peace, ſaid he took the depoſitions of the deceaſed upon oath, while ſhe lay in a languiſhing ſtate in the diſpenſary, the priſoner not being preſent.

Garrow, counſel for the priſoner, objected to the reading of thoſe examinations. He argued, that the law is preciſely the ſame, whether the examination taken be of the perſon whoſe death is charged upon the priſoner, or of any other ordinary witneſs who has been examined to the tranſaction by a magiſtrate, and who had died ſubſequent to that examination. Taking the information offered in evidence, to be that of any other perſon beſides the woman deceaſed, and that ſuch perſon died ſince he was examined before the juſtice, could his examination be received in evidence? Certainly not.

Let us illuſtrate, by ſhewing the miſchiefs that muſt reſult from receiving ſuch an examination.

It may happen, where death is the conſequence of a duel, or a *rencontre*, or in many other inſtances, that there is but a ſingle witneſs preſent. Now ſuppoſe that witneſs goes before a magiſtrate, and depoſes by whoſe hand the homicide was committed, and dies before the trial; ſhall his information, though ſworn to, and in writing, taken behind the back of the accuſed, and not containing *all* the facts and particulars the witneſs knew, and could depoſe to if alive, but containing ſo much as will juſtify the committal merely, be read in evidence on the trial? Certainly not.

Suppoſe this ſame informant to live until the trial, though he ſhould depoſe on that trial, that the deceaſed aſſaulted the priſoner, that the priſoner was reluctant to return the aſſault, and offered terms of reconciliation, and that the priſoner was obliged to uſe a deadly weapon in his own defence; certainly, though on ſuch evidence, by croſs-examination, the party ſo aſſailed ſhould

be diſcharged of the indictment by the jury: yet by the ſummary mode of proceeding againſt him now propoſed, that is, by admitting the information, ſworn before the magiſtrate as evidence, the witneſs being dead, the party accuſed would ſtand at this bar liable to a capital conviction, on the teſtimony of a man, who meant no wrong indeed, but who had only diſcloſed ſo much as was neceſſary to his committal.

The deceaſed woman might have recovered after the examinations, and then the offence would have been different.

Rose, recorder, was for receiving the evidence—

Garrow, in continuance. There is an authority of conſiderable weight exactly in point. It expreſsly ſhews that this examination, under the circumſtances attending it cannot be read, and he ſtated the *King*, v. *Woodcock*. *Ante* 257.

The anſwer to the objection, as it is underſtood at preſent is, that the ſtatute has authoriſed the magiſtrate to take the examination of the priſoner, and the informations of witneſſes; to return them to the court of gaol delivery, and if the witneſſes ſhould die before the trial of the defendant, then the information of the witneſſes, taken before the magiſtrate judicially, ſhould be read in evidence.

The conſequence of the law is, that if an information has been taken purſuant to the ſtatutes of *Philip and Mary*, and is certified to the ſeſſions of *oyer and terminer*, that *then*, if the occaſion requires, and if the evidence given in the information, is let in by the death of the witneſs who ſwore it, it may be read.

But the information offered in evidence has not been taken by the magiſtrate, purſuant to the direction of the ſtatute—it has not been taken judicially. This appears,

Firſt, by the language of the ſtatute. *Secondly*, by the circumſtances of the caſe. Vide *the ſtat.* *Ante* ,

The language of the ſtatute is this: that the juſtice or juſtices, have nothing to do but with a man coming before them to be committed.

This

This is an information, *not* taken in the courſe of a judicial proceeding. The priſoner was not preſent—the priſoner was not on his defence. The juſtice might have held a judicial examination in the hoſpital, and ſtrictly in purſuance of the ſtatutes, and might have thus brought the priſoner before him, in which caſe this information might have been read.

The COURT, on conſulting, refuſed to receive the evidence, relying on the *King*, v. *Woodcock*, as a determined caſe in point. *Ante* 257. *Leach's Cr. Ca.* 568, *M. S.*

The KING, *v.* the INHABITANTS of ERISWELL, *Banc. Reg.* 30 *Geo.* 3. appears relevant to the laſt rule, in many particulars.

This was a pauper's caſe on the poor laws of England. The pauper had given examinations touching the place of his laſt reſidence. No proceedings were had in conſequence of this examination until the order of removal, which was the ſubject of appeal, was applied for and made.

The pauper, from the time of the examination being taken, continued to reſide in *Icklingham, All Saints*, for about five years, and without becoming chargeable to that pariſh, when he became *inſane*, and continued in a ſtate of inſanity to the time of his removal to *Eriſwell* pariſh.

On the part of the *reſpondents*, this examination was offered in evidence, and objected to on the part of the appellants, but was received by the court of quarter ſeſſions, the hand writing of the juſtices who took the ſame being firſt proved.

The queſtion before the king's bench was, whether this evidence was admiſſible.

Bower and *Sayer* argued in ſupport of the admiſſibility of the examination.

Partridge, *Barnard*, and *Hay*, againſt receiving it.

The COURT was divided on the queſtion.

NOTE. This abridgement of the report is confined to the admiſſibility of the examination.

GROSE, J. The queſtion is, whether the information taken before the magiſtrates is competent evidence of the pauper's ſettlement in *Eriſwell*, to warrant the juſtices

tices to make the warrant of removal, and the court of quarter ſeſſions in confirming it?

To prove the facts of the appellant's caſe an *examination* of the pauper, taken before two magiſtrates, was produced, and it appeared that the pauper, ſince his examination, had become *inſane*, and ſtill continued in that ſtate.

The objection to admitting this *examination* as evidence, is, that an agreement muſt be proved either by the parties, or the witneſſes to it; and that the *oath*, either of the party or the witneſs, is not admiſſible in evidence, when it is given in the *abſence* of another who is to be affected by it.

To this it is anſwered *firſt*, that this examination may be read, becauſe it is like a judgment upon which no execution has iſſued. My anſwer is, that it is not like ſuch a judgment, for in the firſt place, before ſuch a judgment can be obtained, the party to be affected by it muſt have had an *opportunity* of being heard; he muſt have been ſerved with a writ, or have had notice of the proceedings. And *ſecondly*, the judgment muſt have been given by a court of *competent juriſdiction*; but in the preſent caſe the juſtices had *not* juriſdiction to adminiſter the oath. By the 13 & 14 *Car.* 2. they are empowered only to remove; and unleſs they adminiſter the oath for the purpoſe of removing it, it is no more than if a juſtice of another county adminiſtered it. Here there was no removal, and they had no power, that appears but for that purpoſe.

Secondly, however, it is ſaid, that this examination is competent, becauſe it is as good evidence as that of a perſon who had heard the pauper ſay, that he had been hired for a year and ſerved it, that ſuch evidence would have been competent, and therefore this is ſo.

As to it being as good evidence as that of a perſon who heard the pauper ſay he had been hired, there is this material difference, that had the perſon been *preſent*, ſuch perſon might have been *croſs-examined*, as to all that paſſed between him and the pauper, if any part of it were to be heard. But here we read only what the overſeers

ſeers chuſe to examine to, and what the magiſtrates thought fit to ſtate.

Next—is ſuch evidence competent? it is what is commonly called *hearſay evidence* of a fact. Now it is a general rule that ſuch evidence is not admiſſible, except in ſome few particular caſes where the exception may be as ancient as the rule. A pedigree may be proved by reputation, preſcriptive rights may be ſo proved; and yet in caſes of preſcription, thoſe very perſons who are permitted to give evidence of what they may have heard from dead perſons, reſpecting the reputation of the right, are not permitted to ſtate facts of the exerciſe of the right, which the deceaſed perſon ſaid they had ſeen: and there is no principle upon which this evidence is admiſſible that may not extend to proving by *hearſay* any agreement whatſoever.

Here the learned judge ſtated a number of *caſes* reſpecting paupers and pariſhes, which had been cited at the bar to ſhew the evidence offered was admiſſible as *hearſay* evidence, and as given upon oath before the magiſtrates: but he obſerved, that *no principle* was ſtated to take the caſe out of the general rule, to ſhew why hearſay evidence of the agreement ſhould be permitted in this caſe any more than in any other.

He then proceeded to the point immediately relevant to this chapter. Before the ſtat. 1 & 2 *Phil. & Mar. ca.* 13. and 2 & 3 *Phil. & Mar. ca.* 10. a depoſition taken before a juſtice of the county where the murder was committed, was not evidence, even though the party died or was unable to travel. Why? becauſe although the juſtice had juriſdiction to inquire into the fact, the *common law* did not admit a perſon accuſed to be affected by an examination taken in his *abſence*, becauſe he could not croſs-examine, and therefore that ſtatute was made. To this point the clauſe in the mutiny act, which expreſsly authorizes the magiſtrates to take the examinations of perſons enliſting is extremely ſtrong. It is clear, that in an action by an executor of the pauper, if it were neceſſary to prove this agreement, the affidavit of a witneſs who was dead, taken before a judge who was to try the cauſe would be incompetent to be read after his death.

death. When then, and upon what *principle* could this man's depoſition upon oath become evidence after his death? no ſuch rule of evidence could exiſt before the ſtatutes of *Charles* the ſecond: ſuppoſe the caſe had exiſted the next year, and the year after the pauper had gone before two juſtices and made the oath he did, and after that upon his death, two other juſtices had removed his family upon that examination, could this court have determined that hearſay evidence of the hiring was good, or that an oath taken before two magiſtrates (not for the purpoſe of removal in the abſence of the other party) would have been good? or ſuppoſe the act of parliament had paſſed two years ago, ſhould we now ſay it is good? no, that would be againſt the known law of evidence, for, as hearſay evidence, it is hearſay evidence of a fact; and as an examination upon oath, and not in the preſence of the oppoſite party, nor taken with an intent to remove, it is *extrajudicial*. If at that time it were admiſſible, when did it become ſo? will the practice of the juſtices at their private meetings or at the quarter ſeſſions make it ſo? ſurely it is too much to ſay, that ſuch practice ſhall alter the law of evidence prevailing through the kingdom, in the courts above and at the aſſizes; as judges of *niſi prius* we do not affect to alter or make new law; how then ſhall it be competent to juſtices of the peace to do ſo? but even were we diſpoſed to conform to a rule of evidence adopted by ſome juſtices of the peace, what are we to ſay in caſes where one court of quarter ſeſſions differs from another in their rules? ſo it is in this caſe, in ſome counties they admit this evidence, in others they reject it; we muſt ſay that ſuch precedents ought not to guide us, but we muſt be governed by the known rules of evidence which are to be found in our law books. If then the deciſions of the courts below cannot alter the law when it is grown into law by the deciſions of the courts above, upon what principle ſhall it now be decided? none is laid down; but it may be ſaid, that it is in this caſe wiſe and diſcreet to depart from the general rule of evidence, and in this inſtance to admit of hearſay evidence of a fact, or evidence on oath adminiſtered

in

in the abſence of the adverſe party. I dread that rules of evidence ſhall ever depend upon the diſcretion of judges; I wiſh to find the rule laid down and to abide by it; in this caſe I find the general rule; I find no decided authority that forms an exception to it; and nothing but a clear incontrovertible deciſion upon the point, and not the conceſſion of counſel, or the *obiter dictum* of a judge, ought to form an exception to a general rule of law, framed in wiſdom by our anceſtors, and adopted in every caſe, except where the exception is as ancient as the rule. The order ſhould be quaſhed.

BULLER, J. ſupported the admiſſibility of the evidence. In this caſe it appears, that the pauper was taken before two juſtices, by the overſeers of the pariſh of *Tiklingham*, where he then reſided, for the purpoſe of being examined as to the place of his laſt legal ſettlement: that he was examined on oath before them and ſigned his examinations.

The pauper afterwards became, and has ever ſince continued *inſane*, and the ſeſſions being of opinion that the *examination* was good evidence, upon the authority of that confirmed the order of removal.

The queſtion reſerved for the opinion of this court is, whether under theſe circumſtances, the examination ought to have been read in evidence.

This caſe has been argued on two grounds, *Firſt*, that it is admiſſible, as an examination taken on oath by juſtices who had a competent authority. *Secondly*, that it is evidence as a declaration under the hand of the pauper.

I am of opinion, that it is admiſſible evidence in each of thoſe lights. But, before I ſtate the grounds on which I hold it admiſſible, it will be proper to premiſe, that I conſider the pauper as *dead*, he being in ſuch a ſtate as renders it impoſſible to examine him, and if he were *dead*, it is admitted at the bar, that there are ſeveral caſes in which it has been held, that what he ſaid might be received in evidence.

The firſt thing to be conſidered is, whether this evidence be admiſſible as *an examination taken on oath by perſons having a competent authority.*

It ſeems to be agreed, by thoſe who argued at the bar, that if the juſtices had made an order of removal immediately on taking the examination of the pauper, the examination then would have been a *judicial act*, and would have been evidence: indeed, the ſecond ſection of the act calls it a judgment. I agree, that if the taking of the examination were not a judicial act, but was merely *coram non judice*, it is not evidence as an examination on oath. The queſtion then is, whether this were a judicial act or not: it muſt be ſo at the time it was taken, or it cannot become ſo at all; and if an immediate removal might have been founded on it, it is a full proof that this was a *judicial* act.

The power of the juſtices is founded on *ſtat.* 13 & 14 *Car.* 2. *ſect.* 1. which enacts, "That it ſhall be lawful, "upon complaint made by the overſeers of any pariſh, "for any two juſtices, by their warrant, to remove and "convey any perſon likely to become chargeable to ſuch "pariſh, where he was laſt legally ſettled, unleſs he "give ſufficient ſecurity for the diſcharge of the pariſh, "to be allowed by the ſaid juſtices."

The ſtatute does not in words ſay any thing about the mode of examination; but wherever a power of judging and determining is given, an authority to examine on oath is virtually and neceſſarily included in it. Whatever the juſtices do in purſuance of that ſtatute, is *judicially* done, and unleſs the rule be general, this abſurdity would follow; if the juſtices are of opinion, on the examination, that the pauper ought to be removed, and do remove him, it is evidence; but if they are of opinion that the ſettlement is in the pariſh requiring the examination, and therefore he ought not to be removed, then it is not evidence; whereas in the latter caſe the reaſons are much ſtronger why the examination ſhould be evidence than in the former, becauſe the pariſh officers are preſent at the examination and are parties to it, being the complainants and the perſons cauſing the examination to be taken. But it never can depend on the judgment which the juſtices ſhall form for, or againſt the pariſh, whether the examinations in the caſe are or are not evidence, it muſt be reciprocal.

This

This examination is ſimilar to the caſe of a depoſition before a coroner, which has been long held to be good evidence, though the perſon accuſed be not preſent when it is taken, nor ever heard of it until the moment it is produced againſt him. 2 *Lev.* 180. *Kelyng* 55. Vide *Lord Morley's caſe.* *Ante* .

The coroner is to inquire into the cauſes and circumſtances of the death of the deceaſed: the juſtices are to inquire to what pariſh the pauper belongs: both inquiries are general, and no particular perſons are parties to them. Again, where depoſitions are taken before commiſſioners of exciſe, if the witneſs *die*, lord *Holt* was of opinion that they were good evidence. *Bredon*, v. *Gill*, 8 *Will.* 3. *B. R.* 2 *Salk.* 555. 1 *Lord Raym.* 219. *S. C.*

Where an act is judicially done, it is not neceſſary that the perſon to be affected by it ſhould be preſent, in order to make it evidence againſt him, and therefore depoſitions taken by a juſtice of a perſon who afterwards died, though in the *abſence* of the priſoner, muſt be read. So it was determined by all the judges in *Radbourn's caſe*, *Mich.* 1787. * *Ante* .

It is the ſame as to depoſitions taken under a commiſſion from the court of exchequer. *Tooker*, v. *the duke of Bedford.* 1 *Burr.* 146.

But an argument was drawn from the mutiny act, which it was ſaid (by juſtice GROSE, *Ante*) made the *depoſitions evidence* in the caſe of ſoldiers, and therefore it was inferred from thence, that the depoſitions were not evidence in any other caſe. That act affords a very different inference. The firſt act which contains any

 clauſe

* This caſe, as reported by *Leach*, varies materially in fact from the ſtatement by Mr. juſtice BULLER; he ſtates, that the information of the deceaſed was taken in the abſence of the priſoner; but in *Leach* it appears that it was taken by a regular magiſtrate, purſuant to the ſtatute of *Philip and Mary*, and *deliberately read over to him*, in the *preſence and hearing of the priſoner*, upon an oath lawfully adminiſtered. [The words in italics are omitted by the learned judge.] *Leach Cr. Ca.* 2 *Edit.* 363. 3 *Edit.* 512. Vide *Ante*

clauſe for examining ſoldiers reſpecting their ſettlements, is 16 *Geo.* 2. which enacts, That it ſhall be lawful for two or more juſtices of the county, or place where any ſoldier ſhall be quartered, in caſe ſuch ſoldier has either a wife or child, to cauſe him to be ſummoned to make oath of the place of his laſt legal ſettlement; and ſuch ſoldier is thereby directed to obey ſuch ſummons, and to make oath accordingly; and ſuch juſtices are required to give an atteſted copy of ſuch affidavit to the perſon making the ſame, or by him delivered to his commanding officer, in order to be produced when required. Provided, that in caſe any ſoldier ſhall be again ſummoned to make oath as aforeſaid, then on ſuch atteſted copy of the oath by him formerly taken being produced, ſuch ſoldier ſhall not be obliged to take any further or other oath with regard to his legal ſettlement, but ſhall leave a copy of ſuch atteſted copy of examinations, if required. That act ſays nothing about the examination or the copy of it being evidence, but moſt probably the legiſlature meant or underſtood, that they would both be ſo; for the object was, to prevent the ſoldier being called upon to attend the juſtices more than once, and at the ſame time to ſubſtitute as good a thing as an examination in lieu of it, for the benefit of the pariſh. But in the 32 *of Geo.* 2. or between that time and the 20 *Geo.* 2. the legiſlature had under their conſideration what would be evidence, and accordingly they inſerted in the above clauſe the following words: "Which atteſted copy ſhall "at any time be admitted in evidence as to ſuch laſt "legal ſettlement, before any of his majeſty's juſtices "of the peace, or at any general or quarter ſeſſions of "the peace," So the law ſtands now; and the *copy* only, and not the *original*, is by the act made evidence, which could only be done on the idea that the *original* was evidence before. If it had been neceſſary to have enacted that the original ſhould be evidence, two words would have done it; and it is impoſſible to ſuppoſe, that the legiſlature meant that the *copy* ſhould be evidence, when the *original* was not. This law therefore affords a ſtrong argument, that the examination is admiſſible evidence.

Again,

Again, what was ſaid by lord chief juſtice LEE, in the caſe of the *King*, v. *Colin St. Aldwin's*, is a very material authority to prove, that this examination was admiſſible in evidence. There an order of removal of a baſtard made in *Wilts*, was founded on the examination of the mother in *Middleſex*. LEE, chief juſtice, there ſaid, "The only material evidence which appears to "have been given, was the examination of the mother, "which ought not to have been admitted; for it is a "general rule in evidence, that the *depoſition of a living* "*witneſs* ought not to be received, *unleſs it appear that* "*the witneſs himſelf could not be produced to be examined* "ORE TENUS; and therefore as the evidence here given "has an original defect, which cannot be ſupplied, this "order ought to be quaſhed." *Read by J. BULLER, from a manuſcript note of juſtice Clive's.*

It clearly therefore muſt have been his opinion, that had the mother been dead, or in a ſtate like this pauper *(inſane)* of incapacity to be examined ORE TENUS, her depoſitions might have been received in evidence.

The ſecond ground on which this has been argued to be evidence is, that it is a declaration under the hand of the pauper. This introduces the general queſtion, whether *hearſay evidence* from the perſon under whom the ſettlement is claimed can be received. This queſtion has been ſo often decided, it would be ſufficient to mention the caſes only; but, as different opinions are entertained on the bench upon the ſubject, I ſhall go ſomewhat more at large into the conſideration of it. It is ſaid, that there is no caſe wherein hearſay evidence has been allowed where the party is *alive* and able to be produced. I agree to that poſition; but, here the party is QUA *dead*, and not able to be produced. Here the learned judge cited a number of caſes in ſupport of his poſition from *Burrowe's* Settlement caſes, and other authorities, and added, that in caſes of pedigree, and other caſes *hearſay* and *reputation* are good evidence: each has authority to ſupport it, but he could ſtate no *principle* in favour of them. 3 *Term. Rep.* 718.

The true line for courts to adhere to is, that wherever evidence, not on oath, has been repeatedly received and ſanctioned

ſanctioned by judicial determinations, it ſhall be allowed: but beyond that, the rule that no evidence ſhall be admitted, but what is upon oath, ſhall be obſerved. It would be eaſy to ſtate or imagine a converſation of which a man gave an account of his own habits and tranſactions in life, his reſidence, his connections and relations, which would be equally material in tracing a title, as in inveſtigating a queſtion of ſettlement: and it would be ſtrange, if ſuch a converſation after the father's death, ſhould be ſufficient to enable the ſon to recover ten thouſand pounds a year, and yet ſhould not be ſufficient to give his ſon a ſettlement as a pauper. Here he cited ſeveral caſes wherein hearſay evidence has been received. 3 *Term. Rep.* 719. Vide *Ante* 14.

Ashurst, J. coincided with Buller, but ſaid that if the caſe was new, he ſhould be ſtrongly of opinion, that the evidence given ought not to have been received, as being hearſay evidence; but thought that as certainty is ſo deſirable in the law in general, and particularly in this branch of it, which relates to caſes of daily occurrence, when a caſe is decided and acted upon, it is better not to overturn it. 3 *Term. Rep.* 720.

Lord Kenyon, C. J. concurred with Grose. He ſaid, all queſtions upon the rules of evidence, are of vaſt importance to all orders and degrees of men; our lives, our liberty, and our property, are all concerned in the ſupport of theſe rules, which have been matured by the wiſdom of ages, and are now revered from their antiquity, and the good ſenſe in which they are founded: they are not rules depending on technical refinements, but upon good ſenſe, and the preſervation of them is the firſt duty of a judge. Evidence ſhould be given under the ſanction of an oath, legally adminiſtered; and, in a judicial proceeding between the parties affected by it, or thoſe who ſtand in privity of eſtate or intereſt with them. I admit that this man, who is proved to be *inſane*, is to be conſidered as to this purpoſe in the ſame ſtate as if he were *dead:* and it has been decided, that in ſuch caſes the party's hand writing may be proved, as if he were actually dead. Then it is ſaid there are two

grounds

grounds on which his examination may be received, as to both of which I agree with my brother GROSE.

Firſt, as an examination taken upon oath before two juſtices of the peace, who it is argued had authority to take it.

Secondly, as to a declaration of the party examined.

The *firſt* depends on *ſtat.* 13 & 14 *Car.* 2. that ſtatute empowers the juſtices to make an order of *removal*, it does not give them an expreſs power to *examine*, but as an examination is neceſſary to get at the facts upon which the judgment of the magiſtrates is to proceed, there is an incidental power given, allowing them to examine when they are called upon to exert their power of removal. But in this caſe they were not applied to for the purpoſe of making an order of removal; the overſeers called upon them for no other purpoſe but to examine the pauper, all the proceedings therefore were extra-judicial; and the examination on oath might juſt as well have been taken before the pariſh clerk, and would have been juſt as much intitled to credit as this. But I will go further: if this examination had been taken in order to found an order of removal upon it, ſtill I ſhould be of opinion that it would have been no better, as far as reſpects the preſent queſtion, than a mere declaration of the party, the effect which I ſhall examine preſently.

Examinations upon oath, except in the excepted caſes, are of no avail, unleſs they are made in a cauſe of proceeding, depending between the parties to be affected by them, and where each has an opportunity of croſs-examining the witneſs; otherwiſe it is *res inter alio acta*, and not to be received.

It has been ſaid, that this is a *judgment* of the juſtices, as appears by the 2 *ſect.* of the 13 & 14 *Car.* 2. which has the word *judgment* in it, and that it is no objection to it being a valid, that the parties to be affected were not preſent. But I think the word judgment in the ſection referred to is only uſed as equivalent to the word *opinion*; and as to a judgment being binding, though the party to be affected was not preſent, that will ſcarcely be found to be ſo unleſs in caſes where the party has had

had an opportunity of being present, or was contumacious, neither of which was the case with the parish now to be affected, but as to them it was altogether *res inter alios acta.*

It has been said, that there are cases where *examinations* are admitted, namely, before the coroner, and before magistrates, in cases of felony. That observation is in support of the general rule, rather than in destruction of it. Every exception that can be accounted for is so much a confirmation of that rule, that it is become a maxim *exceptio probat regulam.*

Those exceptions alluded to, are founded on the statutes of *Philip and Mary*, and that they go no further is abundantly proved. Besides, the examination before the coroner is an inquest of office; it is a transaction of notoriety, to which every person has a right of access; and, writs of *ad quod damnum* have been frequently set aside for want of this notoriety. Vide *the statutes Philip and Mary. Ante* 38.

But without stating the cases which occur on this head, I will do little more than refer to the case of the KING, *v.* PAINE That was not loosely decided, but was the opinion of this court, assisted by the court of common pleas. In *Salkeld* it is expressly said, that the rule cannot be extended further than the particular case of felony; and, in the other book, the chief justice declared, that the depositions were not evidence, and a weighty reason is given, namely, "the defendant not "being *present* when they were taken before the mayor, "and so had lost the benefit of cross-examination." 1 *Salk.* 281. 5 *Mod.* 165. *Ante* 14. 2 *Hawk. P. C. ca.* 46. *sec.* 1. 10.

Secondly, considering this as a *declaration* of the party. Declarations of the members of a family, and perhaps of others living in habits of intimacy with them, are received in evidence as to *pedigrees*; but evidence of what a mere stranger has said, has ever been rejected in such cases; and that has been always understood an excepted case, and to stand on reasons peculiar to itself. His lordship then examined all the cases cited; declared he had never known such evidence received at the sessions

during

during his practice; that Mr. juſtice FOSTER had on a ſimilar occaſion ſaid, "he had heard that *communis error* "*facit jus*, but he hoped he ſhould never hear that rule "inſiſted upon, to ſet up a miſconception of the law, "in deſtruction of the law." He would not enter more into the point, being clear it would be moſt dangerous to adopt it. The *miſtakes* of judges, provided they became univerſal, would, according to that doctrine, become *rules of law*. An uſage commencing at ſooneſt, ſince the 13 & 14 *Car.* 2. contrary to law, and working injuſtice every day it was perſiſted in, would ſupercede the law. Upon the whole, his lordſhip was moſt clearly of opinion, that this *examination* was not admiſſible evidence. It was *ex parte*, obtained at the inſtance of thoſe overſeers whoſe pariſh was to be benefitted by it, and behind the backs of the pariſh againſt whom it has now been uſed, without leaving an opportunity of knowing what was going on, or attending to have the benefit of a croſs-examination, and then concluded, "I regard the "queſtion as of the laſt importance, and as putting in "*danger* the LAW OF EVIDENCE, *in which every man in* "*the kingdom is deeply concerned.*" 3 *Term Rep.* 719, 720. 5 *Term Rep.* 373. *The King*, v. *Ravenſtone.*

The above caſe, and the exceptions ſtated therein, ſtrongly ſupport the general rules of common law, laid down in the preſent chapter, and thoſe chapters which treat of hearſay evidence, confeſſions, and informations. The great principle argued and depended on by three of the judges, admit, that except in caſes of felony, and that by ſtatute, informations, or examinations of witneſs taken before magiſtrates in the abſence of the party charged, cannot be admitted as evidence either at common law or by ſtatute, and eſtabliſhes this general rule, that courts of law will not take cognizance of matter *extra-judicial.* 2 *Hawk. P. C.* 303. 13 *Edw.* 4. 3.

And therefore, even in the king's bench, if on any indictment whatſoever, except only an inquiſition of death found by the coroner on view, if a perſon not mentioned in it be found guilty of the crime whereof others are indicted, yet ſuch finding ſhall not ſerve for

an indictment againſt him, becauſe it was wholly *extra-judicial.* Ibid. *Lord Netterville's caſe. Ante*

And ſir MATTHEW HALE, on this principle, in his chapter concerning the commiſſion of the peace, ſays, if A. commits a felony in the county of B. where he lives, and goes into the county of C. and is there taken, a juſtice of peace of the county of C. may take his examination and informations in the county of C. though the felony were committed in the county of B. 2 *Hale P. C.* 51.

But HALE adds *quæry*, whether upon his arraignment in the county of B. thoſe examinations can be given in *evidence?* "*I have not allowed them*; becauſe, though "the juſtice may commit and examine, and give an "oath to the informers; yea, and bind them over to "give evidence, or commit them, yet that is but for "neceſſity of preſerving the peace, for he hath really "no juriſdiction in the caſe." *Ibid.*

Rule the Sixteenth.

But now it ſeems ſettled, that informations upon oath, taken before juſtices of the peace of one county, may be tranſmitted before juſtices of gaol delivery of that county where the offence was committed, that is, if the offender were brought *before* that juſtice, *quære tamen*, becauſe the offence was out of his juriſdiction. 2 *Hale P. C.* 285.

Yet Vide *Dalt. ca.* 111. *p.* 299. *accordant. New edit. ca.* 164. *p.* 544.

For though the juſtice hath not an original juriſdiction of the cauſe, yet he hath a conſequential juriſdiction thereof having the party before him, and it is in order to the preſervation of the peace.

Rule the Seventeenth.

A depoſition ſworn before a juriſdiction deemed not relevant to the criminal iſſue, cannot be given in evidence to ſupport a proſecution by indictment or information.

As

As in the KING, *v.* WELSH, *Mich.* 1652, *Ban. Reg.*

Welſh was indicted on *ſtat.* 3 *Hen.* 7. which makes the forcible abduction of women felony. It appeared that he forcibly and againſt her conſent, took away a gentlewoman named *Pickring*, and that therefore a temporary act of parliament was obtained, enabling commiſſioners therein named, to hear and determine that marriage, and to diſſolve it, if there was cauſe.

In that cauſe Mrs. *Pickring* herſelf was examined, touching the manner of the marriage, as a ſupplemental proof, and died hanging the ſuit.

Welſh was afterwards indicted upon the ſtatute for this fact, and it was moved, by the counſel for the crown, that this examination of Mrs. *Pickring* might be read in evidence againſt the priſoner.

The COURT denied the motion. *Firſt*, becauſe it was a proceeding according to the civil law, in a civil cauſe. *Secondly*, becauſe that ſuit was originally at the inſtance of Mrs. *Pickring*, and her own cauſe; and though ſhe be, according to the civil law, examinable, as a ſupplemental proof, yet it was a cauſe for her own intereſt, and therefore, at common law, not allowable, though the commiſſioners that took the examination were judges, conſtituted by that which was then allowed to be an act of parliament. 2 *Hale's P. C.* 285.

Rule the Eighteenth.

If a juſtice of peace takes informations in a caſe of high treaſon, it ſeems theſe cannot be read in evidence upon an indictment of treaſon, becauſe high treaſon is not within the commiſſion of the peace; but it is of uſe only as an information upon oath, which they may *take*, though they cannot proceed upon it, for all treaſon is a breach of the peace. 2 *Hale's P. C.* 286.

But *quære tamen*, if it be not allowable to be given in evidence. *Ibid.*

And in the Iriſh ſtatute of *Charles* 1. founded on the Engliſh of *Philip and Mary*, the word "treaſon" is introduced.

The reaſons why theſe examinations and informations are allowable in evidence, ſubject to the precautions ſtated, is, becauſe the juſtices of the peace are judges of record, and the informations before them upon oath, are authorized and required by act of parliament; and they are judges of the crimes upon which the informations are taken. 2 *Hale P. C.* 284, 285.

The author of "*The Theory of Evidence*," in his reading of the ſtatutes of *Philip and Mary*, ſays, depoſitions of witneſſes may be read when the witneſs is dead, but not while the witneſs is living, for they are not the beſt evidence the nature of the caſe is capable of. *Theo. Evid.* 30.

Yet, ſays the ſame author, they may be read where a witneſs is ſought and cannot be found; for then he is in the ſame circumſtances, as to the party that is to uſe him, as if he were dead. *Ibid.* Vide ſame principle ſupported by BULLER, juſtice, in the *King*, v. *the Inhabitants of Elleſmire*. 3 *Term Rep.* 707. *Ante*

So, if it be proved that a witneſs is ſubpœnaed, and fell ſick by the way; for in this caſe likewiſe, the depoſition is the beſt evidence can be had, and that anſwers what the law requires. *Theor. Evid.* 30. *Vide* 1 *Burn's Juſt. Tit. Evid. Bull. N. P.* 239.

NOTE. The caſe of ſir JOHN FENWICK, attainted by act of parliament, 8 *Will.* 3. *anno* 1696, has been occaſionally cited as an exception to the rules laid down in this chapter; but that proceeding cannot be conſidered as a precedent in a court of law, inferior to the high court of parliament, for it was avowedly ſupported on the principle of *neceſſity*, the moſt dangerous of all political excuſes, for innovating the ancient, known, and eſtabliſhed rules of law.

In this caſe the commons, after long debate, on a bill to attaint ſir *John* of high treaſon, there not being two witneſſes, which the ſtatute of *Will.* 3. then recently enacted, required, permitted to be read a depoſition of a perſon named *Goodman*, who was abſent, taken before Mr. *Vernon*, a juſtice of the peace, when ſir *John* (the perſon accuſed) was *not* preſent.

But

But the admiſſion of this evidence was acknowledged, by many of thoſe who ſupported, as well as by all who oppoſed the bill, to be againſt the uſual courſe of law.

The objections to reading the informations were—

Firſt, Sir *John Fenwick* was not preſent when they were taken, and not being preſent or privy to the taking of them, had no opportunity given him to croſs-examine or to contradict *Goodman*, the perſon who had ſworn them.

Secondly, If theſe informations be admitted as evidence, then every thing ſworn behind a man's back, in any caſe whatever, may be admitted.

Thirdly, In civil caſes, no depoſitions or examinations of a man can be made uſe of as evidence: of courſe, they cannot be admitted on a trial for life.

Fourthly, No depoſition of a perſon can be read, though beyond ſea, unleſs in caſes where the party againſt whom ſuch depoſition has been made, was privy to the examination, and had an opportunity to croſs-examine the witneſs: or to examine others to his credit, in order to prove him infamous and incompetent.

Fifthly, In criminal proſecutions, ſuch evidence cannot be admitted; and in an appeal of murder, if depoſitions be taken before the coroner, and there be an examination of witneſſes upon the indictment, though the appeal be for the ſame fact, and in order to bring the defendant to puniſhment, yet in that caſe, theſe depoſitions cannot be read, becauſe it is another ſuit. The indictment is at the ſuit of the crown, the appeal at the ſuit of the plaintiff.

Sixthly, The law of England requires witneſſes to appear and give their teſtimony *viva voce*; and then the court ſees if their teſtimony be credible, or not; and this may be collected from their very countenances and their manner of delivery, and their falſehood may be diſcovered by queſtions put to them by the party accuſed, or by examining them to particular circumſtances, which may develope the falſity of the accuſation, or prove it to be a ſcheme, or a conſpiracy.

Seventhly, A man may ſwear a depoſition reduced into writing, whoſe conſcience, or fear of detection, would prevent

prevent him from publicly accuſing the priſoner face to face: and experience hath ſhewn repeatedly, that there are men who will calumniate the innocent privately, yet will not dare to juſtify the ſame in open court.

Eighthly, As the information was not taken in the preſence of ſir *John Fenwick*, if the informant had *died*, his information could not have been read in evidence. In caſe he had been *ſick*, or had *withdrawn*, without the privity of the priſoner, his information could not have been read. Nay, if withdrawn by the privity of the priſoner, though that would have been good grounds to put off the trial, the information could not be read in evidence.

Ninthly, The jury muſt go *ſecundum allegata et probata*. Evidence of *prima facies* muſt be evidence of living perſons. *Per ſir Thomas Powis, and ſir Bartholomew Shawer.*

Tenthly, On the trial of lord *Mordaunt*, who was tried before the high court of juſtice, they would not allow of this kind of evidence. Sir *Richard Temple. Ante*

Eleventh, Becauſe lord *Hale* denies ſuch evidence to be legal. Mr. *Harley*.

Twelfth, Reading the information amounts to the receiving of hearſay evidence, which ought not to be received. Mr. *Howe*.

Thirteenth, Men have been ſworn againſt before juſtices, and even grand juries, whom the witneſſes have not known, when they came face to face.

Fourteenth, In the caſe of ſir *Robert Stanley*, eleven witneſſes were produced before the grand jury, and when they came to give evidence face to face, before the petty jury, the firſt witneſs did not know the priſoner. Mr. *Brotherton*.

The reaſons given on the other ſide for reading the informations admit, that they ought *not* to be received in *a court of law*, and that they ought *not* to have been read until the informant was *dead*.

The CHANCELLOR of the EXCHEQUER ſaid, "I am "for reading of this paper, though I don't think it evi- "dence equivalent with *viva voce*, nor do I think that "in like caſes it ought to be admitted in the courts of "law.

" law. But I think in your proceedings in parliament " it ought to be read, whether it be an affidavit or not.

Thoſe who ſupported the chancellor of the exchequer, argued: that the commons were not bound by the forms of the courts.

But this was replied to from the other ſide, that though the houſe was not bound by the forms of inferior courts, they were bound by the rules of evidence, of natural juſtice, and of equity, each of which were innovated by the evidence offered, for reaſon, juſtice, law, and equity, were the ſame every where, and ſhould prevail on every occaſion. 5 *St. Tr.* 69. *Burnet's Hiſt. of his own Times.*

Rule the Nineteenth.

In *Ireland*, it was enacted, *anno* 1796, " That if any " perſon who hath given, or ſhall give information, or " examinations upon oath, againſt any perſon or perſons, " for any offence againſt the laws, ſhall after the twen- " tieth day of February, one thouſand ſeven hundred " and ninety-ſix, and before the trial of the perſon " againſt whom ſuch information or examination hath " been, or ſhall be given, be *murdered*, or violently put " to death; or ſo maimed, or forcibly carried away and " ſecreted, as not to be able to give evidence on the " trial of the perſon or perſons againſt whom ſuch infor- " mation or examinations were given, the information " or examination of ſuch perſon, ſo taken on oath, " ſhall be admitted as evidence, on the trial of the per- " ſon or perſons, againſt whom ſuch information or ex- " amination was given." *Iriſh ſtat.* 36 *Geo.* 3. *ca.* 20. *ſect.* 12.

Rule the Twentieth.

" Provided always, that the information or examin- " ation of a witneſs ſecreted, ſhall not be evidence, " unleſs the perſon ſecreted ſhall be found, on a *collateral* " *iſſue*, to be put to the jury trying the priſoner, that he " was ſecreted, &c. by the perſon on trial, or by ſome-

" perſon

"perſon or perſons acting for him or in his favour." *Ir. ſtat.* 36 *Geo.* 3. *ca.* 20. *ſect.* 13.

CHAPTER XXVIII.

In what caſes the character of a Priſoner, and the character of a Witneſs may be put in Iſſue; of the Evidence that may be produced on ſuch iſſue; and of a party's right to impeach the credit of a witneſs produced by himſelf.

Rule the Firſt.

IT has been heretofore held, that a priſoner cannot examine to character, except in *favorem vitæ*, when charged on a capital indictment: but the rule is now wiſely extended to all caſes of *miſdemeanors*. And this appears to have been the ancient practice.

As in the KING, *v.* BENJAMIN HARRIS, 32 *Car.* 2. at *Guildhall*, *London*, indicted for a ſeditious libel.

SCROGGS, C. J. admitted the defendant to call a witneſs to his character, who depoſed, he knew him to be a fair conditioned, quiet, and peaceable man; and that he was ſo reputed among his neighbours; and never was reputed to be a perſon who would ſcandalize the king or the government. 2 *St. Tr.* 1038.

In the KING, *v.* J. MOCKLER, *Commiſ. oyer and terminer*, *Dublin*, *December*, 1797. Indictment for uttering counterfeit ſhillings, knowing them to be ſuch.

DOWNS, J. admitted the priſoner to give evidence of character, as a fraud was charged, and the puniſhment was not *certain*, but *diſcretionary* in the court.

CHAMBERLAIN, J. has alſo admitted evidence to character in miſdemeanors, on the ſame principle, though formerly he refuſed it. And,

In the KING, *v.* KEOGH, *at bar*, *Eaſter* 1798, *B. R. Ireland.* Indictment for a riot and aſſault in the *Marſhalſea.* The COURT admitted the defendant to produce witneſſes to ſhew his conduct to be peaceable, &c. *MS.*

In

In the KING, *v.* JOHN BROWN, *commiſſion of oyer and terminer, Dublin, December* 1798. Before lords KILWARDEN and CARLTON, chief juſtices, the point appears finally ſettled.

The priſoner was indicted, at common law, for uttering a forged inſtrument, purporting to be a promiſſory note for money of ſir *Thomas Lighton*, and co. for one pound fourteen ſhillings and three halfpence.

Mac Nally, counſel for the priſoner, offered evidence of character, on the authority of the *King*, v. *Mockler*, above cited.

Jonas Green, counſel for the crown, objected on the old rule, that evidence of character was only admiſſible in *favorem vitæ*, on capital charges, but the indictment here was not capital, but merely a miſdemeanor.

Lord CARLTON, C. J. Com. P. ſaid he had converſed with many of the judges on the ſubject now before the court, who thought, as he did, that in caſes where character was put in iſſue, evidence of ſuch a nature might be very material: for example, ſuppoſe a man of very great property was indicted for perjury, where the object to be obtained by the perjury was a mere trifle, for inſtance a ſhilling: or ſuppoſe a man to be charged with a riot or aſſault, who was known to be of a peaceable and quiet diſpoſition; evidence of character in ſuch caſes, directly encountering the nature of the charge in the indictment, muſt be of the laſt importance.

His lordſhip then cited the *King*, v. *Robert Carr*, *Guildhall, London*, 32 *Car.* 2. on an information for a libel againſt the government. Sir WILLIAM SCROGGS, who was the judge, and who was not likely to grant a priſoner in ſuch a caſe, any privilege that he was not intitled to, admitted the defendant to give evidence of his character and deportment.

Lord chief juſtice HOLT, his lordſhip obſerved, alſo admitted this ſpecies of evidence, and all the judges in Ireland, upon the late circuits, uniformly received evidence of loyalty, in caſes where the charge was of a ſeditious nature, though amounting only in point of law to a miſdemeanor.

Lord KILWARDEN, C. J. *Ban. Reg.* agreed with lord CARLTON, and obſerved, that the reaſon generally aſſigned

for the admiſſion of ſuch evidence in capital caſes, and capital caſes only was altogether unſatisfactory to his mind. It was ſaid to be in *favorem vitæ*, but, he had no conception, according to the principles of ſound ſenſe and right reaſon, that character could be evidence in a caſe affecting the life of a man, and yet not evidence in a caſe affecting his freedom, his property, and his reputation. *MS.*

In the KING, *v.* CRAWLEY, *commiſſion of oyer and terminer, Dublin, February* 1802. W. SMITH, B. in his charge to the jury, adverted to the evidence of good character which had been given for the priſoner. Character, he ſaid, is of great weight in every caſe, and requires particular attention, when the charge is grounded on *circumſtantial* evidence; for it then creates a greater degree of *doubt* than where the proſecution is ſupported by *direct* evidence. In the former caſe, evidence of character ought to be particularly attended to, becauſe the jury is more or leſs embarraſſed, and called upon to weigh the caſe with more ſcruple and doubt, from the very nature of the teſtimony. *Crawley's tri. reported by Leon. Mac Nally, jun. p.* 65.

Rule the Second.

In giving general character in favour of a priſoner on trial, the witneſs may aſſign in evidence, the *reaſons* on which he gives that character.

So ruled in the KING, *v.* TIMOTHY BRECKNOCK, tried for murder, *at the aſſizes of Caſtlebar, county Mayo, April* 1786, 26 *Geo.* 3. before YELVERTON, C. B. and POWER, B.

The reverend *Henry Henry*, being examined to the character of the priſoner, ſaid, he believed him to be the laſt man in the world who would have a thirſt of blood, and he would give particular inſtances.

The *attorney-general (Fitzgibbon*, afterwards earl CLARE, lord chancellor) objected to ſuch kind of evidence being admiſſible. He relied, that in giving evidence of character, general evidence only was to be received; and that particular inſtances could not be adduced.

Mr. *Stanley*, for the priſoner, contended, the clear rule of evidence was this, when a witneſs is called to

impeach

impeach a man's character, he can only do it by *general* accounts of his conduct and behaviour, and he ſhall not be permitted to give evidence of *particular* facts, which the perſon impeached is not prepared to combat with evidence; for, no man is bound to defend every action of his life, when unprepared for that purpoſe. But this rule does not hold when you call a witneſs to ſupport a man's character; for then the witneſs may not only give the priſoner a good character, but he may give his *reaſons* for entertaining a good opinion of him.

This point, he ſaid, was ruled at a *ſpecial commiſſion of oyer and terminer*, held at *St. Margaret's-hill, Southwark*, on the trials of the rioters, 1780. A man was indicted on the *riot-act*, 10 *Geo.* 1. A witneſs called to give him a character; he gave him a good one; and ſaid his reaſon for entertaining a good opinion of him was, that he knew him to be a dutiful ſon, and that he ſupported a helpleſs parent by his induſtry. An objection was made to the evidence; but,

Lord LOUGHBOROUGH, C. J. C. P. and GOULD, J. made the diſtinction taken, and ruled it to be proper evidence.

NOTE. There is a ſound and a humane reaſon for admitting ſuch evidence. The king is ſworn at his coronation to adminiſter juſtice in mercy: and therefore judges who repreſent majeſty, ſitting in the judgment ſeat, are called upon to receive ſuch evidence, to ground and ſupport a *recommendation* to royal clemency in ſuch caſes, where the evidence warrants it. And,

Lord KENYON's ſentiment, though promulged in a capital charge of the firſt magnitude, may be well applied to all caſes, where the character of the defendant comes in iſſue, "An affectionate and warm evidence of cha-" racter, when collected together, ſhould make a ſtrong " impreſſion in favour of a priſoner, and when thoſe " who give ſuch character in evidence, are intitled to " credit their teſtimony, ſhould have great weight with " the jury." *The King*, v. *Thelwell, Old-Bailey, ſpecial commiſſion oyer and terminer*, 1794.

Rule the Third.

If the *defendant's* character be put in iſſue by the proſecution, the proſecutor may examine to particular facts; for it is impoſſible without it to prove his charge; but in the particular caſe of an indictment for *barratry* this cannot be done, without giving notice to the defendant what particular facts are to be given in evidence. *Bull. N. P.* 296.

Rule the Fourth.

Except in the inſtances given, the proſecutor cannot enter into evidence of the defendant's character; unleſs the defendant enable him to do ſo, by his calling witneſſes to ſupport it; and, even then, the proſecutor cannot examine to particular facts. *Bull. N. P.* 296.

Rule the Fifth.

The credit of a *witneſs* can only be impeached, by general accounts of his character and reputation: not by proofs of particular crimes of which he was never convicted. Vide *Ante Brecknock's caſe.* *Ante* 322.

And therefore it has been repeatedly ruled, that where a witneſs is impeached in character, by the teſtimony of another witneſs called for that purpoſe, the firſt queſtion muſt go to ſhew, whether the party impeaching be acquainted with the general character of the other witneſs, and if he anſwers in the affirmative, he may then be aſked, whether ſuch witneſs be a perſon deſerving credit in a court of juſtice, upon his oath.

As in the KING, *v.* ROCKWOOD, *commiſſion of gaol delivery, Weſtminſter,* 8 *Will.* 3. by Holt, C. J. 4 *St. Tr.* 461.

And in the caſes of the reverend *William Jackſon, James Weldon*, and *John Leary*, 1795; *Thomas Kennedy*, and *Patrick Hart*, in 1796; *Patrick Finny*, in 1797; and *John* and *Henry Shears, John M'Cann, William Michael Byrne*, and *Oliver Bond*, in 1798; who were ſeverally tried for high treaſon, at *Dublin*. Vide *Ridgeway's rep. of theſe trials.* *And Ante*

Rule

Rule the Sixth.

A party ſhall never be permitted to bring general evidence to diſcredit his own witneſs.

So ruled by the HOUSE of LORDS of Great-Britain, in the caſe of governor *Haſtings*, on an impeachment for high crimes and miſdemeanors, *anno* 1789; on this reaſon, for that admitting ſuch evidence would enable the party to deſtroy the evidence of the witneſs, if he ſpoke againſt him; and to make him a good witneſs if he ſpoke for him, with the means in his hands of deſtroying his credit, if he ſpoke againſt him.

Rule the Seventh.

But if a witneſs proves facts in a cauſe which makes againſt the party who calls him; the party may call *other* witneſſes to prove that theſe facts were otherwiſe. *Bull. N. P.* 297.

CHAPTER XXIX.

On a Bill of Exceptions to Evidence in Pleas of the Crown.

Rule.

NO bill of exceptions is grantable on an indictment of treaſon or felony, the ſtatute of *Weſt.* 2. 13 *Edw.* 1. *ſt.* 1. *c.* 2. *c.* 31. *cum aliquis implaciatur coram aliquibus juſticiariis proponat exceptionem, &c.* having never been thought to extend to any ſuch caſe. 2 *Hawk. P. C. ca.* 46.

In ſir HENRY VANE's caſe, *Trinity*, 14 *Car.* 2. *B. R.* Indicted for treaſon. The priſoner having been denied counſel, even to matter of law, he demanded among other things, whether matters done in Southwark, in another county, may be given in evidence to a Middleſex jury? The court ſaid, that he was indicted for compaſſing

ſing and imagining the king's death in Middleſex, and any overt-act to prove this imagination may be given in evidence, whereſoever it be acted. To which ſir *Henry* prayed the benefit of a *bill of exception* upon the ſtatute of *Weſtminſter* 2. *cap.* 31. and prayed that the juſtices might ſeal it; which they all refuſed, and held that it lay not in any caſe of the crown. 2 *St. Tr.* 443.

After ſir *Henry*'s conviction, on the day he was brought up to receive ſentence of death, he offered in his own defence *a bill of exceptions*, having previouſly deſired that counſel might be aſſigned to him, which was denied. He then deſired, that, according to the ſtatute of *Weſt.* 2. *ca.* 31. made the 13 *Edw.* 1. the judges would ſign it; and this he urged ſo home, that the ſtatute was conſulted and read in open court, running in favour of the priſoner to this effect, "That if any man find himſelf aggrieved by the proceedings againſt him, before any juſtices, let him write his exception and deſire the juſtices to ſet their ſeals to it."

He then, citing from lord *Coke*, that this act was made that the party wronged might have a foundation for a legal proceſs againſt the juſtices by a writ of error, having his exception entered upon record in the court where the injury is done, which through the juſtices over-ruling it, they could not before procure, ſo the party grieved was without remedy, for whoſe relief this ſtatute was made. The juſtices refuſing to ſet their ſeals, the party grieved may have a writ grounded on this ſtatute, commanding them to ſet their ſeals to his exception. This exception extends not only to all pleas dilatory and peremptory, &c. but to all challenges of any jurors, and any material evidence given to any jury by which the court is over-ruled.

Further ſays *Coke*, on this ſtatute, if the juſtice or juſtices die, their executors or adminiſtrators may be proceeded againſt for the injury done. And if the judge, or judges, refuſe to ſeal the exception, the party wronged may in the writ of error take iſſue thereupon, if he can prove by witneſſes, the judge or judges refuſed to ſeal it. 2 *Inſt.* 427.

The

The JUDGES over-ruled the point; and, as ſir *Henry Vane* ſays, by ſuch interpretation as themſelves put on the ſtatute, to wit, that it was not allowable in criminal caſes for life. Whereby, continues ſir *Henry*, this makes the law leſs careful for the preſervation of a man's life, than any particulars of his eſtate, in controverſies about which this ſtatute is affirmed by them to hold. Whereas life is the greater, and innocent blood, when ſpilled, is irreverſible as to the matter—it cannot be gathered up again! The eſtate is the leſſer, and if an erroneous judgment paſs about it, it is reverſable upon traverſe, writ of error, or otherwiſe.

The reaſon alledged by the JUDGES, as reported by ſir *Henry*, for he reports his trial moſt accurately, was this, that if it be held in criminal caſes for life, every felon in Newgate might plead the ſame, and ſo there would be no gaol delivery. Sir *Henry* anſwered, his caſe was not the caſe of common felons; but, he deſired he might underſtand, whether they (the judges) would all give it as their common judgment, they would ſtand to, that what he deſired was not his due by the law. By this means they were all put upon it one by one, to declare themſelves in that point unanimouſly, denying him the benefit of that act, and their chief reaſon ſeemed to be, that it had not been practiſed for one or two hundred years. 2 *St. Tr.* 451.

As this caſe is reported by ſir *Henry Vane*, it ſeems to be the opinion of the court, that ſuch bill ought not to be granted in any capital caſe: but by other authorities it appears holden, that it is not grantable on any indictment. *Siderf.* 85. 1 *Keb.* 384.

KELYNG, C. J. who was concerned on this trial, ſays it was reſolved, that the ſtatute of *Weſt.* 2. *ca.* 31. which gives the bill of exceptions, extends only to *civil cauſes*, and not to criminal. The words of the ſtatute are, "*Cum* "*aliquis implacitatur coram aliquibus juſticiariis, &c.*" and the intention never was, to give ſuch perſons liberty to put in bills of exception, for then there would be no trials of that nature ever diſcharged in any time, neither here (king's bench) nor in the circuits, if every frivolous exception which a priſoner would make, ſhould be drawn

up

up in a bill of exception: beſides, the court is always ſo far counſel with the priſoner as to ſee that he hath right, and if they find any thing doubtful, they of themſelves will take time to adviſe. But the words of the ſtatute are plain, as the court agreed as to this point. *Kelyng* 15.

In the caſe of the KING, *v.* lord GRAY, and others, who were convicted in London, it was moved in Chancery, that the lord keeper would grant a mandatory writ to the chief juſtice of the king's bench, to command him to ſign a bill of exceptions, and they produced a precedent, where in a like caſe ſuch a writ had iſſued out of chancery, to the judge of the ſheriff's court in London.

The LORD KEEPER denied the motion, for that the precedent they produced was to an inferior court, and he would not preſume, but that the chief juſtice of England would do what ſhould be juſt in the caſe; for poſſibly you may tender a bill of exceptions that has falſe allegations in it and the like, and then he is not bound to ſign it; for that might draw him into a ſnare; and if they had wrong done them they might right themſelves by an action on the caſe. If this court has power to grant ſuch a writ, it was diſcretionary only, as writs of error are in criminal caſes, which are diſcretionary, and not *de curſue:* and ſaid he had a collection of ſeveral caſes, out of the old books of the law, that were given unto him by my lord chief juſtice *Hale*, which ſhew that writs of error, in criminal caſes, are not grantable, *ex debito juſtitia*, but *ex gratia Regis*, and in ſuch a caſe a man ought to make application to the king, and he will then refer it to his council, and if they certify there is error, the king will not deny a writ of error. 1 *Ver. Cha. Caſ.* 175.

In modern times, ſince counſel have been allowed to priſoners in matter of law, and have been permitted to examine as to matter of fact, the court on doubting the legality of evidence offered, have generally ſaved the point of law, for the opinion of the judges, and in caſe of conviction on the facts, it now is the practice to reſpite ſentence until that opinion be known; and in England

England they often call on counſel to argue the exception taken before the judges at their hall in Serjeant's-inn. Many inſtances of this kind are repeated in *Leach's Cr. Ca.*

CHAPTER XXX.

Of the Evidence of Medical Men in caſes of Poiſoning.

SECTION THE FIRST.

THE proof from the atteſtation of perſons on their profeſſional knowledge, the French lawyers call proof by *experts*.

In proportion as experience and ſcience advance, the uncertainty and danger from this kind of proof diminiſhes. *Gilb. Evid. by Loft.* 301.

Formerly, when the mother of an illegitimate child was indicted for the murder of the infant, if the lungs, being immerſed in water, would float, it was held a proof on which ſurgeons might juſtify an opinion, that the child was born alive; the inflated lungs, in conſequence of the air which had been drawn into them, having been rendered ſpecifically lighter than the water.

But this preſumption is now held inſufficient, for that the air included in the veſicles of the lungs, from other cauſes, may produce this effect in the lungs of a ſtill born child. Vide *Doctor Hunter's Eſſay on this ſubject. Poſt*

In general it may be taken, that when the teſtimonies of profeſſional men of known ſkill and juſt eſtimation are *affirmative*, they may be ſafely credited; but when *negative*, their evidence does not amount to a diſproof of a charge, otherwiſe eſtabliſhed by various and independent circumſtances. *Gilb. Evid. by Loft*, 302.

Thus on a view of a body after death, on ſuſpicion of poiſon, a phyſician may ſee cauſe for not poſitively pronouncing that the party died by poiſon; yet if the party charged be intereſted in the death; if he appears to have made preparation of poiſons without any probable mo-

tive, and this ſecretly; if it be in evidence, that he has in other inſtances brought the life of the deceaſed into hazard; if he has diſcovered an expectation of the fatal event; if that event has taken place ſuddenly and without previous circumſtances of ill health; if he has endeavoured to ſtifle inquiry, by precipitately burying the body, and afterwards on inſpection, ſigns agreeing with poiſon are obſerved, though ſuch as medical men will not poſitively affirm, could not have been owing to any other cauſe, the accumulative ſtrength of circumſtantial evidence may be ſuch, as to warrant a conviction; ſince more cannot be required, than that the charge ſhould be rendered highly credible from a variety of detached points of proof, and that the ſuppoſing poiſon to have been employed, ſtronger demonſtration could not reaſonably be expected to have been under all the circumſtances producible. *Gilb. Evid. by Loft*, 382. Vide *chapter on preſumptive evidence. Poſt*

On the circumſtances above collected, captain DONNELLAN was convicted and executed at Warwick aſſizes, of murder, by poiſoning with laurel water, ſir *Theodoſius Boughton.*

That conviction, however, did not give general ſatisfaction, and ſeveral publications appeared ſeverely animadverting on the charge given by the learned judge *Buller.* The evidence of the medical men examined has alſo been ſtrongly controverted; and at this day there are great doubts on the juſtice of the conviction.

In *Eaſter*, 23 *Geo.* 3. *B. R. Ireland.* The reverend *William Jackſon*, who had been convicted in that term for high treaſon, was brought into court to receive judgment, and while his counſel were arguing in arreſt of judgment, he fell at the bar * and expired. Next morning an inqueſt was held on the body.

* It appeared, that for ſome time previous to his diſſolution, he diſcharged froth from his mouth, and perſpired in a moſt extraordinary and violent degree; ſo much that while ſtanding at the bar a vapour viſibly iſſued from his head.

Mr.

Mr. *Hume* and Mr. *Adrien*, ſurgeons, were ſworn and examined. They opened the body in the view of the coroner's inqueſt, and on inſpecting the ſtomach, ſeemed to have a difference of opinion as to the *certainty* of his having died by poiſon.

They both agreed that the ſtomach was inflamed. Mr. *Hume* alledged that no ſudden *affection* of the mind, however it might occaſion *death*, could produce excoriation in the ſtomach. It was true, he ſaid, where the patient died ſuddenly of the gout in the ſtomach, there were often found ſymptoms of inflation in that part of the ſtomach reſting upon the gut, particularly when the ſtomach has been full. Being aſked whether this appearance in the ſtomach might not have ariſen from putrefaction as he had been ſo long dead. He anſwered, that it does not follow from poiſon, that the ſtomach in particular ſhould putrify. He did not think the poiſon had paſſed from the ſtomach into the remainder of the ſyſtem. It was probably prevented by ſpaſm from circulating. Therefore the infection was entirely local, and the contents ſtill reſted in the ſtomach. He had known many die from agitation of mind, but then there were no ſuch ſymptoms. He had been called to perſons who had been poiſoned by means of copper veſſels, but never knew them to die ſuddenly. They generally vomit for twenty-four hours before death. The *uſual ſymptoms* reſulting from very violent poiſons, were extreme diſtreſs and agitation of body, attended with profuſe and deadly ſweats. He did not think any man could live two moments with a ſtomach ſo affected. Never knew of any dying by metallic poiſons without great pain: but heard that laurel water had been taken by ſir *Theodoſius Boughton*, of which he had ſuddenly died, and without probably, ſuffering much pain. Upon the whole, his opinion was, that Mr. *Jackſon*'s death muſt have been occaſioned by poiſon.

Mr. *Adrien* was not ſo certain what the cauſe of inflammation might be, and thought it poſſible that the priſoner's death might have happened from very violent agitation; from the yellow tinge of his hands it might

appear how great a redundancy of bile had been lodged in the ſtomach.

Mr. *Hume* obſerved, that this matter did not ſo much appear to be bile, as the effect of corroſive ſublimate or ſome ſuch cauſe; and that violent and ſudden agitation did not increaſe the ſecretion of bile, but on the contrary, obſtructed all ſecretions; and that no ſtomach could contain ſo much bile, but would have vomitted it off, as every perſon affected by ſea ſickneſs does, whenever any quantity is thrown into the ſtomach; and further, that bile, ſo far from remaining upon the hands after waſhing, would, having the property of ſoap, aſſiſt in cleaning them, and would come off more readily with cold water than with hot.

Mr. *Adrien* then obſerved, that the ſecretion of bile was proved to be very redundant, there being near a pint reſting in the gall-bladder; but gave due weight to Mr. *Hume*'s reaſoning on the locality of the affection, and propoſed examining further into that fact; which being done, and it appearing that no part of the inteſtinal canal was affected, theſe gentlemen finally agreed:—that the death was occaſioned by ſome unuſually *acrid matter*, taken into the ſtomach. And,

The verdict of the inqueſt was—"We find that the "deceaſed *William Jackſon*, died on the 30th of April, "in conſequence of ſome acrid and mortal matter taken "into his ſtomach; but how, or by whom adminiſtered, "is to the jury unknown."

The contents of the matter contained in the ſtomach was afterwards analyzed, and appeared to contain *arſenic* and *laudanum*.

SECTION THE SECOND.

Of the effects and ſymptoms of poiſon, ſo far as they may be uſeful in inveſtigating by evidence *the cauſe of death, on an indictment for murder by arſenic.*

The effect of poiſon when injected into the blood, or cauſed by the bite of venomous reptiles, or poiſoned weapons, need not be mentioned here.

Poiſons are exceedingly *various* in their operations.

The

The *mineral* poiſons, as arſenic and corroſive mercury, ſeem to attack the ſolid parts of the ſtomach, and to produce death by eroding its ſubſtance.

The antimonials ſeem rather to attack the nerves, and to kill by throwing the whole ſyſtem into convulſions. And,

In this manner alſo moſt of the vegetable poiſons ſeem to operate.

Doctor *Black* gives the following directions to the phyſician who happens to be called upon to give teſtimony, in caſes where it is ſuſpected that a perſon has died by the effect of arſenic.

He ſhould anſwer every queſtion put to him with caution, as the lives and reputations of many depend on his opinions.

The *firſt* queſtion uſually put is—whether from the ſymptoms of the patient, or the appearance of the body after death, he imagines the deceaſed died by being poiſoned by arſenic? the ſymptoms attending the taking of arſenic are, in about a quarter of an hour, ſickneſs at ſtomach, ſucceeded by vomitting, purging, burning pains in the bowels, heat, and thirſt, pains and cramps in the legs and thighs, ſyncope and death.

But we muſt take care not to be deceived by eroſions of the ſtomach, occaſioned by the gaſtric juice, which has a power of diſſolving the ſtomach after death. The difference is, that the arſenic occaſions inflammation and blackneſs, whereas none appears in the other caſe. If the perſon eſcapes, he is in danger of being afflicted by maraſmuc, paralytic affections of the limbs, great debility, &c.

The *ſecond* queſtion generally aſked is—whether any arſenic has been found in the inteſtines? the method of diſcovering this is as follows: the contents of the ſtomach and inteſtines ſhould be taken out and waſhed in water; and any powder it contains ſuffered to ſeparate. If any arſenic be mixed with it, it will fall to the bottom, and muſt then be examined by the following methods.

Firſt, by laying it on red hot iron. If it be arſenic it will evaporate with melting, in a thick white vapour, and this may be ſhewn by the fortieth part of a grain.

Secondly,

Secondly, we may mix ſome of it with charcoal, in which ſtate if it be arſenic, it will emit an odour very like garlic, but this will not be perceived unleſs it be mixed with charcoal or ſome inflammable matter.

Thirdly, we may incloſe the powder with ſome charcoal between two poliſhed bits of copper, the edges of which are moiſtened with a lute made of two parts of fine ſand and one of pipe clay. The plates being then bound together with a wire, and the whole made red hot, the arſenical powder will thus be metallized, and penetrating the copper, a blackiſh ſkin will firſt appear upon it, which being rubbed off the parts which the arſenical vapour has touched, will appear of a whitiſh or lead colour.

We may metallize or reduce the arſenic in a glaſs tube by means of the glaſs flux. This is eaſily done by mixing two or three parts of the flux with one of the powder. This mixture being put into a ſmall glaſs tube and a heat applied ſufficient for volatilizing of arſenic, the greateſt part of it will be metallized. One end of the tube is to be left open at firſt, and then ſtopped with lint or wool; the other made red hot; and if the tube be then broken, the arſenic is then metallized.

One grain of arſenic will be ſufficient for all thoſe experiments.

The firſt ſymptoms that enſue on the taking of arſenic ſhew, that it is of a highly inflammatory, cauſtic, and corroſive nature, with regard to the ſyſtem in general, and the inteſtines in particular: the pulſe becomes extremely weak and irritable, and this is attended with a kind of paralytic affection of the limbs, maraſmus, &c.

Had theſe experiments been made in *Jackſon*'s caſe (*Ante* 330.) the coroner's inqueſt, on the evidence of the phyſicians could have aſcertained, not only the cauſe of his death, but the ſpecific poiſon uſed for that purpoſe: and in ſimilar caſes, whether of ſuicide or homicide, by poiſon or otherwiſe, wherever medical men, ſuch as phyſicians, chymiſts, ſurgeons or apothecaries, can be procured, the coroner ought to call for and compel, on refuſal, their attendance at the inquiſition; the evidence of ſuch witneſſes being the moſt effectual means

of

of ſatisfying the conſciences of the jurors, of bringing the guilty to puniſhment, and of eſtabliſhing the innocency of thoſe, who on ſlight circumſtances, prejudice or malice may be ſuſpected or accuſed.

SECTION THE THIRD.

A knowledge of the antidotes to this ſpecies of poiſon, may alſo be uſeful matter of evidence, as, on an indictment for adminiſtering arſenic, with an intent to murder by poiſon. Indeed humanity calls for a general publication.

Milk and oil have been recommended as antidotes: but the milk may curdle, and the oil will not mix with the fluids in the inteſtines. Mucilages therefore are the moſt adviſeable; and whites of eggs have ſucceeded. After the violence of the firſt attack is over, a milk diet, opiates, &c. are proper, and ſometime after electricity has been found of great ſervice. *Encyclop. vol.* 2. *p.* 355, 356. *Dub. Edit.*

CHAPTER XXXI.

In what manner Witneſſes are compellable to attend the Court, in order to give Evidence.

HAWKINS is of opinion, that in proſecutions for miſdemeanors, the defendant may take out *ſubpœnaes* of courſe: but that in capital caſes he hath no right by the *common law*, to any proceſs againſt his witneſſes, without a ſpecial order from the court. 2 *Hawk. P. C. ca.* 46.

This appears in the KING, *v.* Colonel TURNER, *Old-Bailey ſeſſions, January* 15, *Car.* 2. indicted for felony and burglary. After arraignment, the priſoner prayed of the court that they would make an order to bring in ſome witneſſes he required, as neceſſary to his defence; and mentioned that they were ready to come, but had ſent him word they dare not, unleſs they were ſummoned by an order from the bench.

The

The Lord Chief Justice answered, that those who chose to come in voluntarily might; but the law would not admit the court to summon witnesses; for when witnesses came *against* the king, the court could not put them to their oaths; much less can they precept them to come. 2 *St. Tr.* 505.

Rule the First.

"All persons accused and indicted for any *high treason*, "whereby any corruption of blood may ensue, shall "have the like process of the court where they shall be "tried, to compel their witnesses to appear for them at "any such trial or trials as is usually granted to compel "witnesses to appear against them." *Stat.* 7 *Will.* 3. *sect.* 7. *Irish* 9 *Ann. ca.* 6. *sect.* 9. 4 *Stat. at large*, 263.

Rule the Second.

And now process may be taken out against witnesses for the prisoner of course, in any case whatsoever.

The compulsory process to bring in witnesses in criminal causes (which in *Ireland* is generally called a crown summons) is either by *subpœna* issued in the king's name, by the justices of oyer and terminer, gaol delivery, or the king's bench, where the plea of *not guilty* is to be tried, or the justices or coroner who take the examination of the person accused, and the information of the witnesses, may at that time (and this is the usual way) or at any time after, and before the trial, bind over the witnesses to appear at the sessions, and if they refuse to be bound over, commit them for their contempt on such refusal, and this is virtually included within their commission, by necessary consequences, upon the statute of 1 & 2 *Phil. & Mary, ca.* 13. *Irish* 9 *Ann. Ante* . 1 *Hales P. C.* 52. 282.

And if such witness, being bound over, neglect to appear, he shall forfeit his recognizance. 1 *Burn's Just.* 533.

Where a witness is a prisoner in execution for debt, he must be brought up by *habeas corpus ad testificandum* to give

give his evidence, otherwiſe his coming out of priſon would be an eſcape. *Eliz. Cellier's caſe, Old-Bailey,* 32 *Car.* 2. 3 *St. Tr.* 97. Sir *John Friend's caſe, Old-Bailey,* 8 *Will.* 3. 4 *St. Tr.* 599.

But now ſuch witneſs may (by *ſtatute*) be brought up to give evidence, by rule of court. *Iriſh ſtat.* 38 *Geo.* 3. *ca.* 26. *ſect.* 2, 3.

CHAPTER XXXII.

In what caſes Witneſſes may be allowed their Expences.

Rule the Firſt.

IN civil proceedings a witneſs is not obliged to attend, unleſs his expences are tendered to him, purſuant to the 5 *Eliz. ca.* 9. and if after ſuch tender he neglect to appear, he may be fined, according to the directions of that ſtatute, or be puniſhed by attachment for the contempt of the court, as the circumſtances of the caſe appear to be. 2 *Ld. Raym.* 1529. *Wyat,* v. *Wingford.* 2 *Stra.* 1054. *Small,* v. *Whitnill.* 1150. *Chapman,* v. *Pointon.* 1 *Blackſ. Rep.* 36. *Bowles,* v. *Johnſon.*

Rule the Second.

In criminal proceedings the rule is different, the common law holding, that juſtice ſuperſedes every conſideration of private inconvenience; and, therefore, that witneſſes are bound unconditionally to attend the trial, upon which they may be ſummoned, and be bound over to give their evidence without any renumeration for their trouble or expences.

Rule the Third.

A witneſs refuſing to give evidence is guilty of a contempt.

On this principle in the KING, *v.* CHRISTOPHER LOVE, tried for high treaſon before the high court of juſtice, 3 *Car.*

2. Mr. *Jackſon*, who was called as a witneſs, refuſing to be ſworn, was for his contempt fined five hundred pounds, and committed to the Fleet priſon during the pleaſure of the court. 2 *St. Tr.* 124.

HALE conſidered it a great defect of judicial adminiſtration, that a power ſhould not be veſted in the courts to allow witneſſes their charges, as many times poor perſons grew weary on attendance and bearing their own charges therein to their great hindrance and loſs. 2 *Hale P. C.* 282.

But this grievance at common law has been remedied by ſeveral ſtatutes, *viz.*

The COURT before whom any perſon has been tried and convicted of any fraud or petit larceny, or "other "felony, at the prayer of the proſecutor, and in conſi- "deration of his circumſtances, may order the trea- "ſurer of the county in which the offence ſhall have "been committed, to pay ſuch proſecutor ſuch ſum as "the ſaid court ſhall think reaſonable, not exceeding "the expences he ſhall appear to have been put to in "carrying on ſuch proſecution, making him a reaſona- "ble allowance for his time and trouble therein; which "order the clerk of aſſize, or clerk of the peace, re- "ſpectively, is hereby required forthwith to make out, "and to deliver unto ſuch proſecutor, on being paid one "ſhilling, and no more, which order the treaſurer ſhall "forthwith pay to the proſecutor or his aſſigns." 25 *Geo.* 2. *ca.* 36.

This ſtatute having only removed the inconvenience as to proſecutors, it is further enacted, "That when any "poor perſon ſhall appear on recognizance in any court, "to give evidence againſt another accuſed of felony, "the court, at the prayer and on the oath of ſuch per- "ſon, and on conſideration of his circumſtances, in "open court, may order the treaſurer of the county, or "place where the offence was committed, to pay what "ſum to the court ſhall ſeem reaſonable, for his time, "trouble, and expence, which order the proper officer "of ſuch court ſhall make out, and deliver to ſuch per- "ſon, upon being paid ſixpence; which order the trea-

"ſurer

" ſurer ſhall pay as aforeſaid." *Stat.* 27 *Geo.* 2. *ca.* 3. *ſec.* 3.

And as this laſt recited act extends only to poor perſons appearing on recognizance; and the 25 *of Geo.* 2. before ſtated, gives relief only where the offender is convicted. It is further enacted, " That the court be- " fore whom any perſon has been tried and convicted, " or tried and acquitted of felony; in caſe it ſhall ap- " pear that there was a reaſonable ground for the proſe- " cution, and that the ſaid proſecutor hath *bona fide* pro- " ſecuted, may order upon the prayer of the ſaid pro- " ſecutor, the treaſurer of the county, riding, or divi- " ſion, in which the offence ſhall have been, or have " been ſuppoſed to have been committed, to pay ſuch " proſecutor ſuch ſum of money as to the ſaid court " ſhall ſeem reaſonable, not exceeding the expences " which it ſhall appear he had been *bona fide* put to in " carrying on ſuch proſecution, making, in caſe the " proſecutor ſhall appear to be in poor circumſtances, a " reaſonable allowance for his trouble and loſs of time, " which order the clerk ſhall deliver, on receiving one " ſhilling, and the treaſurer ſhall pay as aforeſaid." 18 *Geo.* 3. *c.* 19.

And, by the ſame ſtatute, it hath further enacted, that " the court where any perſon ſhall appear by recog- " nizance or ſubpœna, to give evidence, as to any fe- " lony, whether any bill of indictment be preferred or " not to any grand jury, provided the ſaid perſon ſhall " in the opinion of the court, *bona fide*, have attended " the ſaid court, in obedience to ſuch recognizance or " ſubpœna, may order the treaſurer to pay what expence " to the ſaid court it ſhall appear, the ſaid perſon was " *bona fide* put to by reaſon of the ſaid recognizance or " ſubpœna, making, in caſe he is in poor circumſtances, " a reaſonable allowance for his trouble and loſs of time, " for which order the clerk ſhall receive ſixpence, and " the treaſurer ſhall pay as aforeſaid." 18 *Geo.* 3. *ca.* 19. *ſec.* 8.

And it is alſo further provided by the ſame act, " that " the quarter ſeſſion may alter or lay down ſuch " rules and regulations, concerning any coſts and

" charges to be allowed to any perſon by virtue of this " act, as to them ſhall ſeem juſt; which rules and re- " gulations having received the approbation and ſigna- " ture of one or more of the judges of aſſize, ſhall be " binding on all parties whatſoever, and no perſon ſhall " be allowed a greater ſum than according to the ſaid " rules ſo approved of, &c." 18 *Geo.* 3. *ca.* 19. *ſ.* 9.

In IRELAND, proſecutors for treaſon or felony, detained from their buſineſs by neceſſarily attending at aſſizes, may have two ſhillings a day allowed them by *preſentment*, if recommended by the judges. *Stat.* 3 *Geo.* 3. *ca.* 28. *ſect.* 18.

END OF THE FIRST BOOK.

RULES OF EVIDENCE,

ON

Pleas of the Crown,

ILLUSTRATED.

BOOK II.

☞ The firſt book treats of Witneſſes, and of objections that affect their competency or their credit: of privilege from examination reſulting from confidential ſituations: of evidence ariſing from the act of the defendant, as converſations, confeſſions, and examinations at common law: of evidence by ſtatute, as confeſſions in caſes of high treaſon, and confeſſions, informations, and examinations, before magiſtrates: Evidence of character, &c.

☞ This book treats of PAROL EVIDENCE, that is evidence delivered upon oath, in open court, in the preſence of the defendant; of facts within the *knowledge* of the witneſs, when examined in chief, and on his *belief*, when under croſs-examination.

CHAPTER

CHAPTER I.

Of the intrinſic and eſſential quality of the Evidence that muſt be given.

Rule the Firſt.

THE firſt and moſt ſignal rule in relation to evidence is this, that a proſecutor muſt produce the *utmoſt evidence* that the nature of the fact is capable of; for the deſign of the law is, to come to legal demonſtration in matter of right, and there can be no demonſtration of a fact, without the beſt evidence that the nature of the thing is capable of. *Gilb. Evid. by Loft*, 4. 2 *Hawk. P. C. ca.* 46.

On this rule, which baron GILBERT calls "*moſt* "*ſignal*," the learned judge obſerves, that a man muſt produce the utmoſt evidence that the nature of the caſe is capable of; for the deſign of the law is to come to *legal* demonſtration in matters of right; and there can be no demonſtration of a fact, without the beſt evidence that the nature of the thing is capable of: leſs evidence doth create but opinion and ſurmiſe, and does not leave a man the entire ſatisfaction that ariſes from demonſtration: for if it be plainly ſeen in the nature of the tranſaction, that there is ſome more evidence that doth not appear, the very not producing it is a preſumption that it would have detected ſomething more than appears already. *Gilb. Evid. by Loft*, 4.

But the ſenſe of this rule, when limitted to its juſt conſtruction is this, that it is not to be underſtood that in every matter there muſt be all that force and atteſtation that, by any *poſſibility* might have been brought to prove it; and that nothing under the higheſt aſſurance poſſible, ſhould have been given in evidence to prove any matter in queſtion. To ſtrain the rule to that height, would be an endleſs charge and perplexity; for there are almoſt infinite degrees of *poſſible evidence*, one under the other; and if nothing but matters of the higheſt aſſu-

rance

rance might be given in evidence, the way of illuſtration of right would rarely attain the end. As for inſtance, no verbal contract could be proved, becauſe a written contract carries with it a greater credibility; and conſequently the unwritten contract would not be the greateſt aſſurance that the nature of the thing is capable of. So a contract atteſted by two witneſſes, gains more credit than a contract atteſted but by one, and therefore, by the ſame argument, one witneſs would be no good proof of a contract. *Ibid.*

The true meaning of the rule of law, that requires the greateſt evidence that the nature of the thing is capable of, appears to be this, that no ſuch evidence ſhall be brought, as *ex natura rei* ſuppoſes ſtill greater evidence behind in the party's own poſſeſſion and power: for ſuch evidence is altogether inſufficient and proves nothing: it even, as before intimated, carries a preſumption contrary to the intereſt for which it was produced: for if the other greater evidence did not make againſt the party, why did he not produce it to the court? as if a man offers a copy of a deed or will, where he ought to produce the original: and therefore the proof of a copy in this caſe is no evidence, and cannot poſſibly weigh any thing in a court of juſtice. *Gilb. Evid. by Loft*, 5. *Bull. N. P.* 294.

This rule is illuſtrated in 6 *Mod.* 225, 248. *Ld. Raym.* 154, 746, 1292, 1371. 2 *Vern.* 471, 591, 603. *Ch. Pr.* 59, 64, 116. 10 *Mod.* 8. *Strange* 52, 6, 1122, &c. See alſo 3 *Salk.* 285, 6, 7. 2 *Salk.* 690. 7 *Mod.* 192. *Ld. Raym.* 730, 734, 5. *Barnard, K. B.* 243. *Vern.* 505.

The legal correctneſs and juſtice of the above rule and reaſoning appear in the caſe of HENRY, *v.* WATSON, tried at *Norwich aſſizes*, 1787.

The action was for a malicious proſecution againſt the defendant, for perjury, ſtrengthened by aggravated circumſtances in the ſubſequent conduct of the proſecutor, who had cauſed to be advertiſed, "That the perjury "cauſe went off in conſequence *of a defect* in the indict-"ment; but that a freſh bill would be preferred."

The

The plaintiff proved the printed advertiſement, by evidence of a copy delivered to the printer, by *Locke*, an agent for that purpoſe, of the proſecutor *Watſon*, who ſwore that he copied it from one received from *Watſon*. The defendant's counſel objected to this evidence; but, the JUDGE ſaid, in common caſes you are certainly right: but in this, *Watſon* gave *Locke* one paper which he meant to be *multiplied*. He employed *Locke* as his agent. He entruſted him with *agency*, and therefore becomes anſwerable for his acts. The paragraph is admiſſible evidence. *Gilb. Evid. by Loft*, 55.

But though a man offers a *copy* of a deed or will where he ought to produce the original, from which a preſumption ariſes, that there is ſomething more in the deed or will that makes againſt the party producing the copy, elſe he would produce the original: yet if he proves the original deed or will, in the hands of the adverſe party; or to be deſtroyed without his default, a *copy* will be admitted: becauſe then ſuch copy is the beſt evidence, the preſumption of greater evidence being in the party's poſſeſſion, being overturned by poſitive proof. *Bull. N. P.* 294. Vide *Le Merchant's caſe. Poſt*

Therefore in LUDLAM, *on the demiſe of* HUNT, *Mich.* 13 *Geo.* 3. *B. R.* A queſtion having ariſen, whether a copy of a will, on which the title turned, could be produced from the regiſter of the eccleſiaſtical court.

Lord MANSFIELD ſaid, the caſe is clear, a man by loſing the evidence of his title ſhall not loſe his eſtate. The rule in all caſes holds to take the beſt evidence which the caſe, *rebus ſic ſtantibus*, according to its real circumſtances will admit. If a copy cannot be produced you may go into parol evidence of the deed. *Gilb. Evid. by Loft*, 4, 5, *in note.*

Rule the Second.

Parole evidence ſhall not be admitted, to contradict an agreement in writing.

As in the caſe of MERES, *et al'* verſus ANSELL, *et al' C. P.* Treſpaſs, *quare clauſum fregit*, treading down the graſs, &c. in *Milcroft*. Pleas, not guilty and a licence.

Lord

Lord MANSFIELD tried this cauſe at the aſſizes. Verdict for the defendant.

Leigh and *Glynn*, ſerjeants, moved to ſet aſide the verdict and for a new trial, upon this ground, that lord *Mansfield* admitted *parol* evidence, which contradicted an agreement in writing, to which the ſame perſon who was admitted to give ſuch *parol* evidence, was a ſubſcribing witneſs, and had himſelf the cuſtody of the written agreement.

Burland, ſerjeant, for the defendant, ſubmitted, that *Matthews*, who gave the parole evidence, was the plaintiff's witneſs, and that what he had depoſed *extra* the written evidence, was no more than an explanation thereof, which was frequently admiſſible.

The COURT were all clearly of opinion, that the verdict muſt be ſet aſide, that no *parol* evidence is admiſſible to diſannul and ſubſtantially to vary a written agreement; the *parol* evidence in the preſent caſe, totally annuls, and ſubſtantially alters and impugns the written agreement. Indeed, in ſome caſes of *wills* and *deeds*, where there are two *John*'s named, or two *Blackacre*'s mentioned, *parol* evidence may be admitted to explain which *John* or which *Blackacre* was meant and intended by the *will* or *deed*. The rules of evidence are univerſally the ſame in courts of law and courts of equity. Suppoſe a bill in equity was brought by the defendant, to have a ſpecific performance of this agreement, the court would not admit *parol* evidence.

You cannot depart from the writing, but may argue touching the operation thereof. If a man agrees in writing to ſell *Blackacre* for one thouſand pounds, ſhall parol evidence be admitted that he intended *Whiteacre* ſhould alſo paſs? It ſhall not. This appeared to be a wilful treſpaſs, no licence was proved, the agreement only extends to taking the hay of *Boreham* meadow, and *expreſſio unius eſt excluſio alterius*. A new trial. 3 *Wilſ.* 375, 6, 7.

So in LOWFIELD, *v.* STONEHAM, executors. Parol evidence of a declaration by the teſtator, when *in extremis* was offered and oppoſed, as being contradictory to the plain words of the will: and the CHIEF JUSTICE ſaid,

it could not be allowed, and that in the caſe of *Selwin*, v. *Brown*, the houſe of LORDS had refuſed it, even where it was to ſupport the legal interpretation of the will. And lord HARDWICKE adhered to the ſame rule in the earl of INCHIQUIN, *v.* O'BRIEN. *Caſ. Temp. lord Talbot* 240.

Rule the Third.

In a criminal proſecution, though the defendant be poſſeſſed of the beſt evidence the nature of the caſe admits of, yet he cannot be obliged, or even legally required to produce it againſt himſelf.

ROE, *on the demiſe of* HALDANE, and others, *v.* HARVEY, in ejectment. *Mich.* 10 *Geo.* 3. *Banco Regis*, illuſtrates this rule.

In this caſe the plaintiff *refuſed* to produce a conveyance, which he had in court.

Lord MANSFIELD, in delivering his opinion, principally laid ſtreſs upon this circumſtance. He ſaid the want of notice was no objection in this caſe, becauſe they had the *deed in court*. The refuſal to produce it was an unfair attempt to recover, contrary to the real merits: and being a deliberate refuſal, by the advice of counſel, contrary to the recommendation of the judge, warranted the ſtrongeſt preſumption, "That the deed would "ſhew, that neither of the leſſors of the plaintiff had "any legal title."

YATES, J. thought the plaintiff ought to have had a verdict. He founded himſelf upon the rules of evidence. Its coming out upon croſs-examination of the witneſs, makes no difference: no more does the value of the eſtate. The plaintiff's counſel were not obliged to produce this deed: no man can be obliged to produce evidence againſt himſelf. The only conſequence of notice to produce it would have been, "the admitting *inferior* evidence." He inſtanced in a caſe which happened before himſelf, when a poll-book, which lay in court, was refuſed to be produced: he held, they could not be obliged to produce it. And this determination was acquieſced in.

WILLES,

WILLES, J. It is reaſonable that if one party is in poſſeſſion of a deed, and refuſes, after proper notice, to produce it, the other ſide ſhould be admitted to prove the contents by inferior evidence. But there is no reaſon why the poſſeſſor of the deed ſhould be allowed to give ſuch inferior evidence, when he *can* give better if he pleaſes.

Lord MANSFIELD. In *civil* cauſes, the court will force parties to produce evidence, which may prove againſt themſelves; or leave the refuſal to do it, after proper notice, as a ſtrong preſumption to the jury. The court will do it in many caſes, under particular circumſtances, by rule before the trial; eſpecially if the party from whom the production is wanted applies for a favour. But in a *criminal* or *penal* cauſe, the defendant is never forced to produce any evidence; though he ſhould hold it in his hands in court. 4 *Burr.* 2484, *to* 2489.

So in the KING, *v.* CORNELIUS, *Trinity*, 17 *Geo.* 2. 1744, *Banco Regis*. Information for a miſdemeanor, in taking of money in granting of licenſes to alehouſe keepers. The proſecutor applied for a rule to inſpect the books of the corporation, but the court, on conſideration, refuſed the application, as it would in effect, be obliging the defendant to furniſh evidence againſt himſelf. 2 *Stra.* 1210, 1211.

In the KING, *v.* Doctor PARNELL, vice chancellor of *Oxford*, *Mich.* 22 *Geo.* 2. *B. R.* the ſame rule was obſerved on an information *ex officio*, by the *attorney-general*, for a miſdemeanor in office. 1 *Blackſ. Rep.* 37. *Poſt* 352.

LEE, C. J. ſaid, that the court were all of opinion, that they could not make the rule abſolute, and that they found[illegible]d their opinion upon former caſes. And the caſes cited were, 2 *lord Raym.* 927, the *Queen*, v. *Mead*, where the reaſon given for refuſing the rule was the maxim mentioned at the bar, "*that no man is bound to* "*accuſe himſelf.*"

Another ſtrong caſe was, *Trinity* 17 and 18 *Geo.* 2. *Rex*, v. *Cornelius* (above cited) which was ſtrongly debated on both ſides by ſir *John Strange* and ſir *Richard Lloyd*, and all the caſes were cited then, that have been

now cited. Time was taken to conſider, there was a conference with all the judges of the court, and all agreed the rule could not be granted, *becauſe it was a criminal proceeding*, and that the motion was, to make the defendants *furniſh evidence againſt themſelves*. The preſent caſe is rather ſtronger, becauſe it is a proſecution for a crime of a *more public nature*, for unleſs it be ſuch, this court hath no juriſdiction. And this is unlike a *quo warranto*, for that is a right granted by the crown, and the public books and records are the proper evidence on both ſides. Rule diſcharged. 1 *Wilſ.* 241.

The REX, *v.* WORSENHAM, and others. *Mich.* 13 *Will.* 3. is alſo in point. An information was preferred againſt the defendants, being cuſtom-houſe officers, for forging of a bond, ſuppoſed to have been given by a merchant to the king for his cuſtoms. And motion was made on behalf of the proſecutor, to have the cuſtom-houſe books in which the entries were made, &c. brought into court to convict the defendants. But the motion was denied, becauſe the ſaid books are of a private concern, in which the proſecutor has no intereſt, and therefore it would be in effect, to compel the defendants to produce evidence againſt themſelves. And the court never make ſuch rules but only of records or deeds of a public nature. 1 *Lord Raym.* 705.

Rule the Fourth.

But notwithſtanding the laſt recited rule, that "in "criminal caſes the defendant cannot be even required "to produce evidence againſt himſelf." It is now ſettled, that in reſpect to the production of ſecondary evidence by the proſecutor, there is no diſtinction between civil and criminal caſes. Vide *L'Merchant's caſe. Poſt* 350.

Rule the Fifth.

Parol teſtimony may be given of a written inſtrument, upon an indictment for ſtealing ſuch inſtrument, notwithſtanding it is proved to be in exiſtence and out of the *actual* poſſeſſion of the defendant; for the poſſeſſion of

of the holder is conſtructively the poſſeſſion of the defendant.

As in the KING, *v.* AICKLES, *Old-Bailey, January* 1784, on an indictment for larceny, in feloniouſly ſtealing a bill of exchange.

Among other facts it appeared in evidence, that the bill charged to have been ſtolen, had been ſeen a few days before the trial in a ſtate of negociation, in the hands of a Mr. *Smith*, and that a *ſubpœna duces tecum* had been ſerved upon him; but he did not appear, nor was the bill produced in evidence.

Silveſter and *Fielding* for the priſoner, ſubmitted that the bill ought to have been produced in evidence. The bill is proved to be in exiſtence, and it is incumbent on the proſecutor to produce it. He might have taken proper meaſures for this purpoſe before he had proceeded to trial. If the bill had been loſt or deſtroyed, parol teſtimony might perhaps have been admiſſible, but it is a clear and ſettled principle of law, that parol teſtimony cannot be given of any exiſting written inſtrument.

Garrow, for the crown, anſwered. It is proved, that the bill is in the hands of Mr. *Smith*, who has been ſerved with a *ſubpœna* to produce it; and as he has refuſed to comply, *parol* teſtimony may be given of its contents. If it had been in the priſoner's poſſeſſion, the next beſt evidence to the bill itſelf would have been admiſſible; for as a priſoner *cannot* be compelled, or even legally *required* to produce any evidence which may operate againſt himſelf, the next beſt evidence which it is in the power of a proſecutor to produce, is always admitted; and in the preſent caſe the poſſeſſion of Mr. *Smith* is to be conſidered as the poſſeſſion of the priſoner. The principle therefore that *parol* teſtimony cannot be given of a written inſtrument, unleſs there is a ſtrong preſumption previouſly raiſed of its being loſt or deſtroyed, is not univerſal and without exception.

On this point, this queſtion was referred to the JUDGES—whether as the bill in queſtion had not been produced, the parol teſtimony which had been given concerning it, was legally received?

The

The JUDGES were unanimouſly of opinion, that the *parol* teſtimony had been properly received; and the priſoner was ſentenced to be tranſported. *Leach Cr. Ca.* 3 *Edit.* 330.

Rule the Sixth.

In a criminal proſecution, the ſolicitor for the crown may give *notice* to the defendant to produce a paper in his poſſeſſion, and in caſe he neglects to produce it, he may give other evidence of its contents; and copies are admitted when the originals are in the adverſary's hands; for the ſame reaſon as when originals are loſt by accident; that is, becauſe the party had not the original to produce.

So ruled, ATTORNEY-GENERAL, *v.* LE MERCHANT, *Niſi Prius*, *Mich.* 1772. Before EYRE, Baron.

This was an information on the *ſtatute* 7 *Geo.* 1. *ca.* 21. *ſec.* 9. for importing tea into *Guernſey*, without having firſt been loaden and ſhipped in Great-Britain, &c.

The *attorney-general* offered to read letters concerning this tea, which had been ſent to *Chanon*, a witneſs for the crown, which letters were proved to have come to the defendant's hands, under an order made by the lord chancellor, for the delivery up to him of all papers and letters, ſeized under a commiſſion of bankrupt againſt *Chanon*, among which were theſe letters.

The ſolicitor of the exciſe had contrived to take copies of thoſe letters, whilſt they were in the hands of the clerk of the commiſſion, and *notice* having been given to the defendant to produce the *original* letters, and that being refuſed, the *attorney-general* offered to read theſe copies.

The *counſel* for the defendant objected, principally that a defendant in a criminal caſe, was never bound to produce evidence againſt himſelf; that he was guilty of no crime in not producing them, and that the attorney-general had no right to call upon him to produce them, or to aſk a ſingle queſtion concerning them, conſequently no copies could be produced.

EYRE,

EYRE, B. admitted the evidence. He conceived that the principle on which copies were admitted was this, that they were the *beſt evidence* which the nature of the caſe could admit of, that *was in the power* of the party producing them to give; and not on any idea of any crime in the perſon in whoſe poſſeſſion the originals were, refuſing to produce them. And he thought there was no difference between criminal and civil caſes.

The JURY found for the crown.

The LORD CHIEF BARON, afterwards, delivering the opinion of the court, on a motion for a new trial, grounded on the above point, ſaid, the queſtion now is, whether the admitting of theſe copies in evidence, was proper or not? if they were improperly admitted, there ought to be a new trial. If the copies of theſe letters were not evidence, the jury might have found otherwiſe. The queſtion now is, whether that evidence was properly admitted or not? And that depends upon the exceptions which were taken on the motion for a new trial. *Firſt*, it was objected, that copies of letters or papers, in the hand of the adverſary, ought not to be read in criminal caſes. *Secondly*, that ſuppoſing they ought to be admitted, yet in this particular inſtance the notice that was given was not ſufficient.

As to the firſt objection, that copies are not admiſſible in any criminal caſe, becauſe that would be to oblige a man to produce evidence againſt himſelf; the anſwer was, that the defendant's counſel have not produced any one caſe to ſhew any difference at all as to the rule of evidence in criminal and civil caſes; therefore the rule in both caſes is the ſame; that is, to have the beſt evidence that is in the power of the party to produce, which means, that if the original can poſſibly be had, it ſhall be required; but if that original be deſtroyed, or if it is in the hands of the oppoſite party, who will not produce it, then in a caſe of a deed, a counter one, or ſometimes a copy of the deed, or a copy of the paper, is evidence to be admitted.

But it is ſaid, that this does not hold in *criminal* caſes, becauſe the conſequence of it would be, to compel a man to produce evidence againſt himſelf: for this purpoſe

poſe the KING, *v.* PARNELL, in the king's bench, and *Brazier's* caſe in *Strange* 1210, were relied upon. Now, with reſpect to this, the rule is certainly true, and the caſes that were cited to this purpoſe are unqueſtionably right, and law; but they do not apply to the preſent caſe.

The KING, *v.* PARNELL, was in *Hilary*, 22 *Geo.* 2. 1748. There had been an information againſt doctor *Parnell*, the defendant, who was vice chancellor of *Oxford*, for refuſing to act upon a complaint againſt ſome ſcholars, and the motion was, the common motion for a rule to ſhew cauſe, why the attorney-general, and thoſe authorized by him, ſhould not inſpect all the public books, archieves, records, &c. in the cuſtody of the proper officer, to take copies. The attorney-general, ſir *Dudley Ryder*, narrowed his demand, and deſired only to ſee the ſtatutes of the univerſity; but the court refuſed it, becauſe it would be to compel the defendant to produce evidence againſt himſelf; for the court had granted this rule for the inſpection, and the doctor had diſobeyed it, he would then have been liable to an attachment. *Ante* 347.

So in the KING, *v.* CORNELIUS, and others. Upon that rule, had they obeyed it, they would have been compelled to have produced evidence againſt themſelves; and have been ſubject to an attachment if they had not. 2 *Stra.* 1210, 1211. *Ante* 347.

But the defendant, *Le Merchant*, is not compellable to produce theſe letters againſt himſelf; for he is liable to no puniſhment at all if he does not, but is left to his entire liberty either to do it or not; the only conſequence muſt be, that theſe copies, which muſt be ſworn to be true copies, are read againſt him. If they are not true copies, he has it in his power to prove that by producing the originals.

It was likewiſe ſaid in ſupport of the motion, that the reaſon why copies are permitted to be evidence in common caſes is, becauſe the party who has them in his cuſtody and does not produce them, is in ſome fault for not producing them; it is conſidered as a miſbehaviour in him; and therefore in criminal caſes, a man who does not produce them is in no fault at all; and for that

reaſon

reaſon a copy is not admitted. But that is not the rule, it is not founded on any miſbehaviour of the party, or conſidering him in fault; but the rule is this, the copies are admitted when the originals are in the adverſaries hands, for the ſame reaſon as when the originals are loſt by accident, that is, becauſe the party has not the originals to produce; and no difference has ever been made between civil and criminal caſes.

LAYER's caſe, *B. R. Mich.* 1722, 9 *Geo.* 1. high treaſon, is appoſite. The charge was an overt-act, in publiſhing a treaſonable paper in the county of Eſſex: a witneſs proved the priſoner did produce a paper, and ſhewed him only part of it doubled, and then put it in his pocket; he remembered ſome lines of it, this was parol evidence of the contents of the paper, the purport of which was, to excite the nation to an inſurrection, and to ſhake off the miſeries and calamities they were under from the miniſtry. In that caſe no objection was made by the counſel Mr. *Hungerford* and Mr. *Kettleby*; they ſeemed to ſay, that the whole ought to be produced; that it was only a part, and therefore took off the force of the evidence; they did not object to that man's giving parol evidence of the contents of a paper in the hands of the priſoner, and that in a caſe of high treaſon. And there YORKE, ſolicitor-general, ſaid, "after this paper was produced the priſoner took it back, "put it into his pocket and kept it; therefore the paper "itſelf being in his cuſtody, we were properly per-"mitted to prove the contents of it by parol evidence." This is not contradicted by the court, and though it is only the ſaying of one counſel, yet not being contradicted, it is ſtrong. 6 *St. Tr.* 229.

Another objection has been made, that this notice is not ſufficient. The anſwer is, there is no difference between the rule of evidence in civil and criminal caſes. Then, if there be no ſuch difference, the rule which has always been followed and allowed in civil caſes is, that notice be given to the attorney or agent of the adverſe party; now, in this caſe, without going minutely into the conſideration, whether the notice was proved to the defendant himſelf and was good, here is unqueſtionable

notice to *Sayer*, who is the agent and ſolicitor to *Le Merchant*, into whoſe hands it appears that theſe letters had actually been delivered; and then there is likewiſe notice to *Davy*, who is the attorney for the defendant in this very cauſe, and no attempt was made, on the part of the defendant, to prove what was become of theſe letters, or that it was not in his power to produce them. 2 *Term. Rep.* 201. *Leach Cr. Ca.* 3 edit. 336. *S. P.*

In the KING, *v.* WATSON, and others, *Hilary* 28 *Geo.* 3. 1788. This point reſpecting notice is fully determined.

It was a rule to ſhew cauſe why an information ſhould not be granted againſt the defendant.

Bearcroft, *Partridge*, and *Graham*, in ſhewing cauſe againſt the rule, among other things ſaid, that if the court ſhould give leave to file an information, it would be impoſſible that the proſecutor could ſucceed at the trial; for he had no means of procuring the original order on which to frame an information, the tenor of which muſt be ſtated, becauſe the corporation are not bound to criminate themſelves by the production of it.

BULLER, J. It has been ſolemnly determined (in *Le Merchant*'s caſe) that in a criminal proſecution, you may give notice to the defendant to produce a paper in his poſſeſſion, and in caſe he neglects to produce it, you may give other evidence of it. 2 *Term. Rep.* 201.

So in the KING, *v.* colonel GORDON, *Old-Bailey*, *September ſeſſions*, 1784, indicted for the murder of lieutenant colonel *Thomas*, in a duel. The letter from colonel *Gordon* containing the challenge, was carried by his ſervant and delivered to colonel *Thomas*. The ſervant of colonel *Thomas* brought a letter in anſwer back, and delivered it to colonel *Gordon*'s ſervant; but it did not appear that the letter was in *fact* ever delivered to colonel *Gordon* himſelf.

EYRE, B. admitted an atteſted copy of it to be read againſt the priſoner, and left it with the jury as legal evidence, if they were of opinion that the original had ever reached the priſoner's hands.

HOTHAM, B. concurred, but,

GOULD,

GOULD, J. thought that positive proof ought to be given that the original had come into the prisoner's possession; and cited *Francia*'s case. 6 *St. Tr.* 58.

In GATES, *qui tam*, *v.* WINTER, *Easter* 29 *Geo.* 3. the point respecting *notice* to produce evidence was again determined. Action to recover a penalty on the post-horse act. At the trial, before GOULD, J. at *Maidstone* assizes, the plaintiff proved a notice to the *defendant's attorney* to produce the licence; but the defendant's counsel objected to that, as this was a popular action it must be considered as a criminal prosecution, in which cases it is necessary to give notice to the *defendant himself* to produce papers, &c. And the learned judge being himself of this opinion, nonsuited the plaintiff.

On a rule to shew cause why the nonsuit should not be set aside, the court without hearing argument, on the authority of *Le Merchant*'s case, in which this very point is decided, made the rule absolute. 3 *Term. Rep.* 306.

Rule the Seventh.

It is a general rule, that whenever an *original* is of a *public nature*, and would be produced in evidence, an immediate sworn copy is evidence: unless where particular cause, such as an alteration or erasure in the original be shewn; or the parties consent.

As in LYNCH, *v.* CLARKE, *Hilary*, 8 *Will.* 3. *B. R.* HOLT, C. J. said, that a copy of a *fine* or *recovery* is good evidence, so it be sworn to be a true copy, and examined and compared with the original. 3 *Salk.* 154.

And whenever an original is of a *public nature*, and would be evidence if produced, an immediate sworn copy thereof will be evidence. As the copy of a *bargain and sale*. Or a *deed enrolled of a church register*. But where an original is of a *private* nature, a copy is not evidence, unless the original is lost or burned. 3 *Salk.* 154.

And in HOE, *v.* NELTHROPE, *Hil.* 8 *Will.* 3. *B. R.* HOLT, C. J. held, that the copy of a *probate of a will* is good evidence, where the will itself is of *chattles*; for there the probate is an original, taken by authority, and

of a public nature. Otherwiſe, where the will is of things in the *realty*, becauſe in ſuch caſe the eccleſiaſtical courts have no authority to take probates; therefore ſuch probate is but a copy, and a copy of it is no more than the copy of a copy. 3 *Salk.* 154. 1 *Lord Raym.* 154. *S. C.*

So in MAN, *v.* CARY, *Paſch.* 9 *Will.* 3. The queſtion was, whether the *copy* of a *bank note*, remaining upon the file in the bank of England, was good evidence or not? and the juſtices of the common pleas held, that it was; for that it was like the copy of an enrollment of a pariſh regiſter, the bank being a public body, eſtabliſhed by act of parliament, for public purpoſes. 3 *Salk.* 155.

In the KING, *v.* lord GEORGE GORDON, *Hil.* 20 *Geo.* 3. at bar, for high treaſon. Sworn *copies* of certain entries in the journals of the houſe of commons, were produced on the part of the crown, and read in evidence, without being objected to. *Dougl.* 593. *MS.*

In the caſe of the EAST INDIA COMPANY, *Mich.* 12 *Geo.* 3. On a motion of *Dunning*, to ſhew cauſe why the company ſhould not permit their *original* tranſfer-books to be produced, on the ground that *copies* from them could not be read. He ſaid, there had been many nonſuits for want of producing the original journals of the houſe of commons, *copies* not being admiſſible. But the court denied that rule to be law, as ſtated, and mentioned ſeveral inſtances where copies of matters, not of record, are admiſſible, as copies of *court rolls*, of *pariſh regiſters*, &c. And,

Lord MANSFIELD expreſsly ſaid, that copies of the journals are evidence, and were admitted on a trial at bar, and cited Sir WATKYN WILLIAM WYNNE, *v.* MIDDLETON, the ſheriff of Derbyſhire, on a falſe return.

The COURT added, that the reaſon *ab inconvenienti*, in holding it not neceſſary to produce records, applied with ſtill greater force to ſuch public books as the transfer books of the *Eaſt India Company*, for the utmoſt confuſion would ariſe, if *they* could be tranſported to any, the moſt diſtant part of the kingdom, whenever their contents ſhould be thought material on the trial of a cauſe.

Dougl.

Dougl. 572. *Iriſh ed.* 593. Vide *Skelling*, v. *Farmer.* 1 *Strange* 646. And *Murray*, v. *Thornhill.* 2 *Stran.* 717.

The principle therefore ſeems to be, as laid down in LYNCH, *v.* CLARKE, by lord HOLT, that "whenever "an *original* is of a *public nature*, and would be evidence "if produced, an immediate *ſworn copy* will be evidence." 3 *Salk.* 154. *Ante* 355, 356.

So in JONES, *v.* RANDALL, *Hilary*, 14 *Geo.* 3. *B. R.* Action upon a wager, whether a decree of the court of chancery would, or would not, be reverſed in the houſe of lords. Verdict for the plaintiff.

Upon a rule to ſhew cauſe why there ſhould not be a new trial, one of the objections was, that a copy of the reverſal only, and not the minute book itſelf was produced.

Lord MANSFIELD. The minutes of the judgment are the ſolemn judgment itſelf. Not a word is added upon the journals: for the *inconvenience* would be endleſs if the journals of the houſe of lords are to be carried all over the kingdom. Formerly a doubt was entertained, whether the minutes of the houſe of commons were admiſſible, becauſe it is not a *court of record*; but the journals of the houſe of lords, have always been admitted, even in criminal caſes. *Cowp.* 17.

In the KING, *v.* SMITH, *Mich.* 5 *Geo.* 1. A rule was moved to produce an examination on a trial, and the court doubting, it was adjourned.

The CHIEF JUSTICE afterwards delivered their opinion, where things are evidence in themſelves, as corporation books, we make no rule to produce them; but only that the parties may have copies, which copies are evidence: but this examination is not evidence of itſelf, without proving the hand of the party; and ſo it is of warrants and affidavits, and therefore a copy of them is no evidence, and the court muſt have the original, for nothing elſe concludes, the party make the rule that the juſtice *produci facit* (not *prod producat*) the examination at the trial, and give the party a copy in the mean time. 1 *Stra.* 126.

In BROCAS, *v.* the MAYOR, *and aldermen of London*, *Eaſter*, 6 *Geo.* 1. The plaintiff moved that he might have

have a copy of the poll, and that sir *John Ward*, who as mayor, presided at the election, might produce the original at the trial.

Cheshire, serjeant, cited two cases, and produced the rules where the copy of the poll was ordered to be given, and the original to be produced. 12 *Ann.* sir *Peter Delme*'s case, and *Trinity*, 4 *Geo.* 1, *Parminter*'s case.

Strange, *contra*. As to a copy, they have already; and as to producing the original, it is an extraordinary attempt, because no use can be made of the original, but what can be made of the copy. He cited the *King*, v. *Smith* (vide *last case*) in which the court declared, that where things are evidence of themselves, &c. &c. and so it was held in the *Company of Gunsmiths*, v. *Turville*, *Mich.* 4 *Geo.* 1.

As to *Delme*'s case it was made without any affidavit, which intimates there was a *consent* in it. And in *Parminter*'s case, there was suspicion of an alteration in the poll.

PRATT, C. J. The *original* is never ordered to be produced where the *copy* is evidence, without such a particular foundation as has been mentioned. It was denied in sir *Gilbert Heathcate*'s case. In the case of *Delme* there was a consent.

EYRE, J. In the case of *Marlborough* the original was produced, but it was upon an affidavit of rasure.

FORTESCUE, J. The poll is either a public thing like corporation books, or it is only in the nature of the officers or on private memorandum. If the first, then a copy is as much as you can ask, without some particular foundation. If the second, then you cannot have so much as a copy. 1 *Stra.* 307, 308.

And in WARINER, v. JONES, *Mich.* 7 *Geo.* 2. After the fire of *London*, power was given to the city to set out public markets, which was done and entered in their books. On motion, leave was granted to inspect the books and take copies. And the court compared it to the case of court rolls, which are considered as the evidence of the lord, but in the nature of *public books* for the benefit of the tenant. 2 *Stra.* 954, 955.

BULLER

BULLER aſſigns this reaſon for the admiſſibility of the laſt ſpecies of evidence. That the rolls of a court baron are evidence, for they are the public rolls, by which the inheritance of every tenant is preſerved; and they are the rolls of the manor court, which was anciently a court of juſtice, relating to all property within the diſtrict.

And therefore a *copy* of a court roll *under the ſteward's hand*, is good evidence to prove the copyholder's eſtate. 1 *Keble* 567, 720. *Comb.* 138.

So an *examined copy* of the court roll is good evidence, if ſworn to be a true one. *Comb.* 337.

For whenever the *original* is evidence, the *copy* is evidence. *Caſe of the Manor of Bray.* 12 *Mod.* 44.

And the *cuſtomary of a manor*, ſet forth upon parchment, found amongſt the court rolls, and delivered from ſteward to ſteward, was received as evidence, though it could not properly be called a court roll. DENN, *on ſeveral demiſes of* ANN GOODWIN, *and others*, v. SPRAY. 1 *Term. Rep.* 466.

So the pariſh regiſter of chriſtenings, marriages, and burials. MAY, *v.* MAY, *at Bar.* 2 *Stra.* 1073. 1 *Salk.* 281. *The King, v. Dutcheſs of Kingſton.* 11 *St. Tr.* 250.

In the KING, *v.* MOTHERSELL, *Eaſter*, 4 *Geo.* 1. *B. B.* it was ruled, that the corporation books are generally permitted to be given in evidence, when they have been publicly kept, and the entries made by the proper officer. 1 *Stra.* 93.

Rule the Eighth.

But papers relative to proceedings in corporations, though of ancient dates are not evidence, unleſs they be alſo corporate acts.

As in the KING, *v.* GWYN, *Mayor of Chriſt-church, Mich.* 7 *Geo.* 1.

On a trial at bar the queſtion was, whether A. B. at the time he did a corporate act, was an out burgeſs or not. And to prove he was, the defendant, who had a rule for copies, produced a copy of a letter fifty years old, and found in one of the corporation cheſts, wherein

A. B.

A. B. is mentioned to be of another place, but the court refuſed to hear it read, becauſe not a corporate act within the rule, ſo that a copy of it is not evidence, but the original ought to be produced. 1 *Stra.* 401. *

CHAPTER II.

Of PAROL EVIDENCE, and how far HEARSAY may be admitted at common law, and by virtue of the ſtatutes.

Rule the Firſt.

No evidence can be received againſt a priſoner but in his preſence: and therefore it is agreed, that what a ſtranger has been heard to ſay, is in ſtrictneſs no manner of evidence, either *for* or *againſt* the priſoner. 2 *Hawk. P. C. ca.* 46.

The reaſons aſſigned as the grounds of this rule are, becauſe ſuch evidence is not upon *oath*: and alſo becauſe the party, who would be affected by ſuch evidence, had no opportunity of croſs examination. And theſe rules are ſtrongly illuſtrated in various caſes. See the KING, *v.* PAINE. *Ante* 14. The *King*, v. *Woodcock*. *Ante* 297. The *King*, v. *Dingler*. *Ante* 299. The *King*, v. *the Inhabitants of Eriſwell*. *Ante* 301.

Rule the Second.

But *hearſay* evidence may be made uſe of by way of inducement or illuſtration of what is properly evidence. *Ibid.* and *Bull. N. P.* 294.

* NOTE.—As all the rules and caſes in this chapter are connected with and illuſtrative of the firſt rule, it was thought beſt to connect them under one chapter, though ſeveral of them clearly belong to BOOK 3. which treats of *Written Evidence*.

Rule

Verbal confeſſions, and what a priſoner has been heard to *ſay* at any time in converſation, or by obſervation, relative to the matter in iſſue, may be given in evidence *againſt* him. 2 *Hawk. P. C. ca.* 46. Vide *chap.* CONFESSION *ante.* 8, 37, 268, 282. 2 *St. Tr. (Harg.)* 1005.

And therefore words ſpoken at any time may be given in evidence to ſupport an overt act of high treaſon, though not treaſon in themſelves. 1 *Hale, P. C.* 116. *Foſt.* 202. 1 *Hale, P. C.* 114.

Rule the Fourth.

But though the declarations of a priſoner reſpecting facts, or which apply to the particular caſe charged, though the *intent* ſhould make part of the charge, may be given *againſt* him, they can not *for* him.

Therefore a witneſs for this purpoſe can not be called in the priſoner's defence: but he may *croſs-examine* any of the witneſſes on the part of the proſecution as to any thing they may have heard him ſay relating to the fact he is charged with. *Bull. N. P.* 294.

So in the KING *v.* JOHN HAMPDEN, *Hilary*, 35 *Car.* 2. *Ban. Reg. anno* 1683. indicted for a miſdemeanor, in confederating to raiſe an inſurrection.

Williams, of counſel for the defendant, interrogated a witneſs to his diſpoſition, and whether he was a ſeditious and turbulent man, or a ſtudeous and retired man.

JEFFERIES, C. J. ſaid, addreſſing the counſel—"Will "that be any evidence? will Mr. *Hampden*'s declaration "be any evidence, he being a perſon *accuſed?* do you "think he would tell the witneſs or any body elſe?"

Doctor *Lupee*, the witneſs, anſwered, that the two years he lived with Mr. *Hampden* he kept him company in his ſtudies, and all that time he found he had no other inclinations but for ſtudy and knowledge, and his inclinations were very virtuous. He always obſerved in his diſcourſe a great ſubmiſſion and reſpect that he had for the laws of the nation and his prince, and to that degree he was a faithful ſubject to the king, and that once he

told him, in diſcourſing with him on the late popiſh plot, that he was ready to ſacrifice his life and fortune for the king's ſervice.

The witneſs was then aſked, what diſcourſe he had with Mr. *Hampden* about the plot.

Sir GEORGE JEFFERIES, C. J. on hearing this, again addreſſed himſelf to the defendant's counſel thus—"Will "that be any evidence, do you think, he being a perſon "accuſed? do you think he would tell the doctor, or "any body elſe, that he was guilty, when he was like to "be queſtioned? that would have been a wiſe buſineſs, "indeed! You ſay he was a very ſtudeous man, and a "learned man; truly if he had done that, he had be-"ſtowed his learning to very little purpoſe."

Williams anſwered, that he would aſk this—Whether in diſcourſing with the defendants upon the diſcovery of the late conſpiracy, and the danger of the times, he would have adviſed him to have gone, and whether Mr. *Hampden* did not anſwer, "he would not, "he was an innocent man, and would not ſtir."

The CHIEF JUSTICE replied, Well; aſk him what you will: but his declaration of his own innocence can *not* be evidence. 3 *St. Tr.* 843.

This was on a miſdemeanor. In a caſe of high treaſon, a ſimilar point was debated at great length, and produced a deciſion which will probably ſtand unſhaken, and indeed, unqueſtioned in future. This was—

The KING *v.* HARDY, tried for high treaſon in compaſſing the death of the King, *Old Bailey Seſſions*, 34 *Geo.* 3. *anno* 1794.

Erſkine, of counſel for the priſoner, put this queſtion to Mr. *Daniel Steuart*, a witneſs—"You ſtated in your "former examination your perſonal acquaintance with "the priſoner at the bar, and your tranſactions with him "before. Did you ever hear him ſtate what his plan of "reform was? The witneſs anſwered, he always ſtated "it to be the *Duke of Richmond*'s plan, univerſal ſuffrage, "and annual parliaments." Q. "Was that ſaid to you "publicly or in privacy of confidence?" A. It was ſaid "publicly, and he ſold me ſome copies of the *Duke of* "*Richmond*'s letter."

The

The *Attorney General*, Sir ROBERT SCOTT objected to the evidence.

Erſkine, on the authority of the KING *v.* HOLT, *Ban. Reg.* 39 *Geo.* 3. *anno* 1793, ſaid he was inclined to think he ſhould ſucceed in ſhewing the admiſſibility of the evidence offered from what fell from the judges of the King's Bench, (two of whom were now preſent) when it was diſcuſſed how far a paper that had been publiſhed in the year 1780, written by ſome perſons of rank, ſhould have been received in evidence by Mr. Juſtice *Wilſon*, who tried an individual, in 1793, for a libel. The court ſupported the rejection of it. The learned judge rejected it upon this principle: that the defendant in that caſe was charged with an *act*, which act was the publication of a libel, and that although the act of parliament directs in fact, that the trial upon a libel like the trial upon any other caſe, proceeds by the judge's giving his opinion to the jury in matter of law, ſtill it does not require that there ſhould be any evidence upon the ſubject ſhewing the *intention*. And upon this ground they ſay—you may *rebut* evidence which faſtens any thing that is wrong upon you, undoubtedly; but becauſe a perſon has publiſhed a libel, ſuppoſing it to be one, in the year 1780, that will be no anſwer to your publiſhing a libel in the year 1793. It may be matter in mitigation of puniſhment; but, ſaid the COURT, it is not ſtrictly evidence, becauſe it does not go to negative the *giſt* of the indictment; for ſuppoſing it to have been received by the judge, he could not have told the jury, if he thought, it point of law, the publication was a libel, that the publication of the ſame libel, by any other perſon, at any other time, was a ſhield againſt the criminal law attaching upon the defendant in that caſe, and upon that ground Mr. Juſtice *Wilſon* decided it, and, as the court of King's Bench determined, rightly decided it. 5 *Term. Rep.* 436.

On the authority of the above caſe, *Erſkine* conſidered himſelf in poſſeſſion of the opinion of the court in the ſtriking difference between the caſe now in agitation, and a caſe where a man is charged with a *fact*, which fact, if it be done, the criminal *intention* which ariſes from

the commiſſion of the criminal act, carries with it a certain legal inference, which legal inference being once eſtabliſhed, it does not become a matter of fact for the priſoner to endeavour to rebut.

Leaving out of conſideration the act of parliament reſpecting libels, he ſaid, on the authority of Lord MANSFIELD, in the *King* v. *Woodfall*, that wherever the fact does conſtitute the crime, but that the fact is either in itſelf wholly indifferent, or it is not indifferent, but criminal; if it be criminal ſhort of the charge that is made upon the party, that there the *intention* is not matter of *law*, but that it is matter of *fact*, and that the party has a right to prove his *intention* in every way by which the intention of a man can be ſafely or reaſonably collected. To apply that doctrine to the caſe mentioned, he ſtated, that though the defendant called no witneſſes to rebut the criminal inference, yet Lord MANSFIELD ſaid—if it be upon the libel, he may arreſt the judgment upon the record, for the *fact of publication* is the crime that is imputed to him; and if, when it comes before the court, that publication turns out to be no libel, the defendant have no judgment pronounced upon him. 5 *Burr.* 261.

Now what is the preſent caſe? The priſoner is charged with the overt acts, but he is not charged with the commiſſion of thoſe acts, as *ſubſtantive acts*, but he is charged with having *in his mind* the wicked and deteſtable purpoſe of aiming at the deſtruction of the King, to put down and bring the King to death, and that in the fulfilment of that moſt deteſtable imagination he did the ſpecific acts charged upon the record. Here then the *intention* of the mind is the queſtion which the jury have to try. Then that being the caſe, let us ſee whether the *declarations* of a priſoner, charged with a wicked and evil *intention*, can not be given in evidence for him. *Ante* 320.

He then cited—*Firſt*, the caſe of Lord GEORGE GORDON, which he conſidered as the moſt important, becauſe the priſoner was not charged with *compaſſing* the death of the King, but with an *act*—with levying war, and quoted Lord MANSFIELD's words to ſhew that the *intent* of the priſoner was the object for the jury to decide

side upon. In that case the counsel for the prisoner were permitted to ask of the Rev. Mr. *Middleton* this question: "Did you at any of those numerous meetings "of this protestant association ever hear Lord *George* "*Gordon*, in his public speeches in that association, make "use of any expressions which shewed any thing disloyal "or unconstitutional in him?" "Not in the least, the "very reverse is my opinion." He then stated several other questions of the same kind put by Mr. *Kenyon*, who acted with him as counsel for lord *George*, and observed, that neither the attorney or solicitor general, nor the judges, lord MANSFIELD and Mr. Justice BULLER, made the smallest objection.

Secondly, Lord RUSSEL's case, 35 *Car.* 2. for compassing the King's death. In his defence, lord RUSSEL called many witnesses to speak to his affection, and said himself to doctor *Burnet*, "If you please to give some "account of my converfation." Doctor *Burnet* says: "I have had the honour to be known to my lord *Russel* "several years, and he hath declared himself with much "confidence to me, and he always, upon all occasions, "expressed himself against all risings." Now this is not *character*, to say that lord *Russel* was a quiet peaceable man; no, this is evidence of *conversation*, therefore it is not that you are to raise a probability upon the subject by the general nature of a man's character, or what you think of him; but it shall be allowed to witnesses to say what the person trying has *expressed*, because it raises an intrinsic improbability of his being guilty of the crime imputed to him. He then quoted other questions of the same tendency permitted to be put by the court. 3 *St. Tr.* 706.

Thirdly, THOMAS ROSEWELL's case, 36 *Car.* 2. *B. R.* A dissenting minister indicted for preaching a treasonable sermon. Besides giving evidence directly denying the charge, he called several of his congregation to prove that he generally kept the thirtieth of January as a fast. Mr. *Rosewell* says, "Did you ever hear that I should say "any thing ill of the King and government?" Mr. *Strong*. "No, never." Mr. *Rosewell* asks *Atkinson*, another witness, "That which I call you for now, sir, is,

"to

" to teſtify what you heard about the thirtieth of Ja-
" nuary about me, as a day of faſting and prayer for
" the King and all that are in authority." *Atkinſon.*
" My lord, he kept that day, the thirtieth of January,
" as a day of faſting and prayer, and he preached that
" text on the 1 *Timothy, ca.* 2. *v.* 1. " Pray for the king
" and all in authority." That was not the ſermon for which he was indicted, but in order to ſhew it was not probable he ſhould have preached ſuch a ſermon as he was charged with, he ſhews that at a recent time he had preached differently; and certainly it is fair evi-dence. A man is not a republican on Monday, a monarchy man on Tueſday, and a republican again on Wedneſdy: his ſentiments do not change in a mo-ment.

Mr. *Atkinſon* proceeds in his evidence: " and then
" he did aſſert that kingly government was moſt agree-
" able to the word of God, and the conſtitution of
" the government of England." It is material to know who tried this cauſe.—Lord Chief Juſtice JEFFERIES tried this cauſe, and he received the evidence. 3 *St. Tr.* 997.

Fourth. CORNISHE's caſe, 1 *Jac.* 2. *anno* 1615. He was indicted for compaſſing the king's death. The overt act was conſpiring with lord *Ruſſel* and the duke of Mon-mouth to levy war. He called ſeveral witneſſes to teſtify his loyalty; and though the witneſſes were diſcouraged they were permitted to ſwear that they thought him loyal, and that he often drank the king's health. Lord chief juſtice JONES was the judge, and Sir *Robert Sawyer* and Mr. *Finch*, who had proſecuted lord *Ruſſel* and *Algernon Sidney*, were ſtill attorney and ſolicitor generals. When were thoſe caſes? At the very worſt times in this country, when judges were, what none of the pre-ſent judges can, in the nature of things be, men depen-dant on the crown. 4 *St. Tr.* 130.

Fifth. JOHN ASHTON's caſe. 2 *William* and *Mary.* He was indicted on the ſecond of *Will. and Mary* for a con-ſpiracy to dethrone king *William*, and compaſs his death. The counſel for the crown, in opening, charged the pri-ſoner with an intention to introduce popery; in anſwer

to

to which he gives evidence of his zeal for the proteſtant religion and averſion to popery. This trial was before Lord Chief Juſtice HOLT, and was concluded on the part of the crown by Serjeants *Thompſon* and *Tremain*. 4 *St. Tr.* 455.

Sixth. Sir JOHN FRIEND's caſe. 8 *Will.* 3. He was indicted for compaſſing the death of the king, and promoting an invaſion and rebellion within the realm. In his defence he called many witneſſes, not to his *character*, but to *declarations*. He ſays to the witneſſes, "When "you have been in my company, and they have been "ſpeaking of the government, what have I ſaid or done?" 4 *St. Tr.* 599.

Is that any thing like *character*? Suppoſe at this moment I ſhould turn about to Mr. *Steuart*, and ſay, "When you have been ſpeaking of government with "Mr. *Hardy*, what has he ſaid or done?"

Seventh. PETER COOK's caſe. *Old Bailey Seſſ.* 8 *Will.* 3. He was indicted for the ſame treaſon of which Sir *John Friend* was convicted, and the priſoner in his defence goes exactly to the ſame kind of evidence adduced upon the former trial. Mr. Serjeant *Darnel*, who was counſel for the priſoner, ſays, "What have you heard the priſoner ſay about our fleet or army?"

Now, ſays *Erſkine*, what has that to do with his *character?* It was to negative the probability of his wiſhing to bring to deſtruction our army and navy, and to bring in a foreign prince who had been expelled from this country for not recollecting what right belonged to the people of this country. He ſays, "I have heard "him wiſh proſperity and ſucceſs to our fleet."

Eighth. The next is the caſe of DEMAREE and PURCHASE, 1710. He was a badge waterman to *Queen* ANNE. He was tried for pulling down a meeting-houſe, which *Foſter* ſays, "was held to be a conſtructive levying of war *," and which was not put as

* NOTE—The treaſon charged on *Damaree* was riſing to the amount of five hundred perſons with an intent and proceeding to pull down *all* meeting-houſes, that conſtituted the crime. *Foſter's Cr. Law*, 208, 213, 216. 8 *St. Tr.* 218.

as an overt act of compaſſing the queen's death. The law ſays, a man ſo acting is guilty of high treaſon; but a man may ſay, "I did not *intend* to levy war." Here is an ambiguous thing, a thing which if it be ſaid not to be legal, is totally different from the charge in the indictment. It is the attorney general's duty to put a different conſtruction on it, and I am ſeeking to prove that probability by the ſame rules evidence ever adopted, not in a caſe like this, where the *intention* conſtitutes the crime. The intention is not any thing that you can argue into intention, but muſt be deduced from acts—then ſurely I have a right to aſk, whether the priſoner meant to purſue the *Duke of Richmond*'s plan, and to leave it to the jury to infer, whether he meant to commit the crimes imputed by this indictment. Surely ſuch queſtions go ſtrongly to negative that *intention* which conſtitutes the eſſence of this crime. 8 *St. Tr.* 267.

In DAMAREE's caſe, upon the examination of *Whitaker*, the counſel for *Damaree* aſked, "was he diſaffected "to the queen and government?" The witneſs anſwers, "I believe no man better affected. At any times when "there have been public rejoicings for any victories "how has he behaved himſelf?" Now the firſt queſtion is as to *character*, as affected or diſaffected, collecting it generally, but the ſecond is to what he has ſaid when converſed with, how he has *declared* himſelf; that is, *not* to character.

The difference between evidence to *character* and this ſpecies of evidence is this—you can not, when examining to character, aſk what has *A. B. C.* told you about this man's character. No, but what is the general opinion concerning him. But this ſpecies of evidence is totally foreign to that, as it is a declaration of the priſoner to an individual witneſs on a particular occaſion, and connected with the ſubjects under examination. 8 *St. Tr.* 218.

Tenth. The KING *v.* FRANCIS FRANCIA. *Old Bailey January Seſſions*, 1716. 3 *Geo.* 1. He was indicted for high treaſon in correſponding with the Pretender. In his defence, *Hungerford*, one of his counſel, ſays to a witneſs, "What do you know of the priſoner's behaviour?"

haviour?" The anſwer was, "It was a great ſurpriſe "to me, when I heard that he was taken up: for we "often uſed to drink a health to king George."

In FITZ-HARRIS's caſe, *Eaſter*, 33 *Car.* 2. *B. R.* for treaſon, the priſoner aſks a witneſs, "whether he thinks "the act with which he (the priſoner) is charged was done "with a treaſonable intention."—That is not objected to, though *Jefferies* conducted the proſecution: 3 *St. Tr.* 224.

Erſkine concluded thus: Suppoſing the authorities cited out of the queſtion, or that they had not exiſted, but that the argument ſtands upon the *principles* of the criminal law of England, when the nature of the caſe before the court is conſidered; when anomaly is attended to; when it is recollected, that although the ſtatute of 25 *Edw.* 3. does not make the overt act charged upon the record treaſon, yet when the overt act is admitted to be charged upon the record, *every thing* which creates a *probability* to the *contrary* to *negative* the *intention* muſt be received; provided it be a rational principle of evidence, provided it be of a ſort that when one looks round it one ſees nothing by which juſtice can be ſurpriſed or endangered. What is preſſed has been indulged to others in ſimilar proceedings. His wiſh was this, that the law of the land ſhould be adminiſtered fairly and impartially. That one man ſhould have what another has had, but no more, and no leſs.—"I conceive," continued *Erſkine*, "that when the attorney general takes into "conſideration the caſes cited and the principle on "which they are grounded, he will think this evidence "ought to be admitted. It is a matter of importance, "not only as it concerns the adminiſtration of juſtice in "general, but as it concerns the caſe of the priſoner." Vide *Hardy's Trial, by Gurney, vol. iv. p.* 28 *to* 45, *inclusive.*

Gibbs, ſame ſide, ſubmitted that the evidence offered is admiſſible. The law that ariſes out of the caſe is exhauſted; but it ſeems a plain principle, in a caſe of this ſort, that the declaration of the priſoner, explaining the overt act, the tendency of which overt act is the point for the jury to determine, muſt be admiſſible evidence.

It is laid down in *Hale*, and in many cafes, that an overt act, indifferent in its nature, may yet be explained by an overt act committed, tending to the purpofe conceived by the prifoner of deftroying the king; for inftance, in *Crohagan*'s cafe, the act charged, the coming into England, was in itfelf an indifferent act, which became an overt act of compaffing the king's death, becaufe the *intent* of his coming into England was explained by *words*, fpoken elfewhere; and fo in many other cafes words fpoken by a man, not only at the time of the overt act, but before that time are admiffible; for there is no limitation of time within which words fpoken by a prifoner may not be given in evidence to explain the nature of an overt act, charged to be an overt act in the profecution of his defign of compaffing the king's death. Vide *Foſter's Crown Law*, 202, 203. 1 *Hale, P. Cr.* 116. *Keil.* 13. *Cro. Car.* 332.

Now if the crown may give *evidence* of the whole of a man's life, for the purpofe of explaining an indifferent act, and giving it a criminal complection, furely it follows, upon the principle of adminiftering equal juftice, that whatever he faid upon the fame fubject, tending to prove *a different intention*, an innocent intention, it fhould be competent in him to give in evidence. The diftinction is this: if that which is charged upon a man to be an act, if it be a thing done, you can not in any cafe give in evidence that the prifoner has denied that he did the thing. The crown in that cafe may give evidence that he did at any time admit that he committed the act, the prifoner can not anfwer that by fhewing that at another time he faid he had not done it, though you may afk whether he had not held fome other converfation which explained the tendency of that. We have it not in queftion now, whether he did commit the overt act ftated in the indictment, but whether in committing the act he had, or had not, the original defign.

Eyre, C. B. Here the *defign* is *part of the overt act*; it is defcribed as part of the overt act.

Gibbs. The diftinction is this—there is before the jury both the fact and the defign as to depofing the king, namely, the fact of confenting to hold a convention, and the

the deſign with which it was conſented to be held; but we are now about to ſhew *what the deſign was* to exculpate the priſoner from any criminal intention. It is admitted we could not go into evidence of what the priſoner had ſaid at any time of his life for the purpoſe of ſhewing he had not conſented to hold this convention, becauſe that is a fact; but in order to ſhew that that convention was conſented to be held, not with the deſign which the crown imputes, but with an innocent deſign, we may go into evidence of what the priſoner at *other times* declared, inaſmuch as the crown has gone into all that which the priſoner at any part of his life has declared touching the fact; and not only that, but into evidence of what any member of the London Correſponding Society, any member of the Conſtitutional Society, or any member of any ſocieties correſponding with thoſe ſocieties have ſaid. As the crown is permitted to go into evidence of what any one of thoſe people have ſaid, in order to prove that the ultimate deſign was to depoſe the king; we only aſk, in anſwer to that, that we may be permitted to go into declarations of the priſoner of that which can be only found in his own mind; not that he did *not do* the act imputed to him, but that the *deſign* with which he *did* that act was different from that which the crown imputed to him.

He then put as in point the caſe of *murder*. Suppoſe it plainly proved that the priſoner did kill the deceaſed, and the queſtion is, whether it is murder or man-ſlaughter that will turn upon the *intent*. In that caſe it is the conſtant uniform practice to receive evidence of the declarations of the priſoner of his good-will and friendſhip to the deceaſed; and the rule is not confined to declarations immediately upon committing the act, but to declarations of former times. Why are theſe declarations received? The act of giving the blow is admitted. So here the calling of a convention is admitted; the declarations are received for this purpoſe, to ſhew what *the mind* of the man was; what his *intent* muſt have been, whether he gave the blow to produce death or not. Then with what view do we offer this evidence? To ſhew his *deſign*, whether it was the deſign the attorney

general imputes, or an innocent one. We offer this evidence in order to ſhew that the object of this convention was different from that which the attorney general ſtates, in the ſame way as the evidence of good will to the deceaſed is admitted in a caſe where the queſtion is, whether the crime is murder or man-ſlaughter. *Hardy's Trial, by Gurney, vol. iv.* 46, 47, 48.

Attorney General, Sir *Robert Scott*, now Lord ELDON, Chancellor of ENGLAND, ſaid, he made the objection to the queſtion being put to the priſoner upon a public principle, and did not trouble the court from a c- ſciouſneſs that he was right; he could not ſacrifice t- inclinations what appeared to his mind to be a great ciple in judicature, adopted and acted upon for the benefit of the public, and therefore for the benefit of every individual who formed a part of it.

He agreed that the queſtions, with reſpect to the *effect* of evidence and the *admiſſibility* of evidence, are perfectly diſtinct. In the caſe before the court, it had been given in evidence that Mr. *Tooke*, whoſe name occurs in the indictment, at the Crown and Anchor tavern, upon the ſecond of May, 1792, ſpoke with great reſpect of the hereditary nobility of the country; and ſpoke alſo with reſpect of the majeſty of the king. Why is that evidence? Becauſe it was a tranſaction of the two ſocieties met in the courſe of the buſineſs which they had been doing; and alſo, becauſe it came out upon the croſs-examination, a circumſtance materially to be attended to. So with reſpect to the priſoner at the bar, there has been *evidence given* of the effect of the papers produced that the language he was to hold was to be ſuch language as prudence would permit; that he received papers which were not communicated to the ſociety; and one private letter in which a propoſition is ſtated, that monarchy is to be ripped up by the roots: that in the anſwer to that letter it is ſtated to thoſe who held that converſation with him, "Do not talk about monarchy, let your "language be confined to univerſal ſuffrage and annual "parliaments, and all the reſt of your object will follow." There may be a great number of theſe circumſtances given in evidence, but then the queſtion will follow—

whether

whether the declarations the man made is given under ſuch *circumſtances*, at ſuch *time*, and in courſe of a converſation, which makes that declaration evidence.

On Lord GEORGE GORDON's caſe, he obſerved that the principle upon which the declarations of the defendant were received in evidence was, that the declarations were really a *fact*; for whatever declaration *accompanies* the tranſaction, whatever declaration is a *part* of the tranſaction that is done, is part of the fact that is doing; and upon that ground the declarations were admitted. It does not weaken the obſervation that evidence was given that lord *George Gordon* went to a magiſtrate, or ſome other perſon, whilſt the mob was over-ruling the civil power; for any converſation that was held by lord *George Gordon*, during the exiſtence of the riots, and with reference to them, he being a party in them was a declaration made *at the time* and upon all the principles of evidence was therefore *connected* with the tranſaction.

CROHAGAN's caſe is as diſtinguiſhable from the preſent evidence upon the ſame principle. The object was to prove the view with which the man came into England. He declared "he would come into England to kill the "king." He did come into England. His making the declaration, though it would be puniſhable in another way, yet ſtill would not be high treaſon if he had not come into England; and upon the whole of the evidence, the coming into England made a part of the tranſaction with the declaration he had made. It was an overt act of high treaſon, becauſe it was then underſtood to be a fact done.

What is the evidence in the caſe of ROSEWELL and others ſtated? Firſt, he has not ſtated with reſpect to theſe trials who were the witneſſes allowed to ſpeak to theſe facts, or whether the circumſtances were aſked upon croſs-examination. He has not ſtated whether witneſſes were called to general character, and then gave in evidence theſe circumſtances in explanation of the general character they had given. He has not ſtated whether the witneſſes who ſpoke to thoſe particular declarations were ſpeaking to declarations which did or did not

paſs

paſs in the courſe of the very tranſaction which theſe witneſſes were called to prove.

He did not mean to contend that it may not be competent to ſtate every word that *Hardy* ever ſaid in the correſponding ſociety—every word he ſaid in his correſpondence with other ſocieties; every word that he ever ſaid in the conſtitutional ſociety; every word which it can be ſhewn, upon the evidence propoſed, had a direct connection, or could be fairly connected with the tranſaction before the court: but he objects to the calling of a witneſs who was not a member of any of theſe ſocieties, a witneſs who had already told the court that he knew but little of Mr. *Hardy*, and that he did not even know he was an aſſociated member of a ſociety; a witneſs called not to this queſtion whether in the courſe of any tranſaction connected with the ſubject before the court, Mr. *Hardy* made a declaration that could be conſidered as a part of that tranſaction, but that he ſhould be aſked what were the declarations of Mr. *Hardy* at any time when he may have ſeen him without connection with the ſubject which is the matter of the preſent indictment. If this evidence be let in for a priſoner, it will probably lead to let in evidence againſt him. There may be caſes in which, if this ſort of evidence can be let in upon principle, may furniſh a principle upon which evidence may be offered, which has not been attempted in this cauſe.

Solicitor General John Mitford (now lord REDSDALE, Chancellor of IRELAND), ſaid he troubled the court for the purpoſe of ſtating the extent to which the principle might go. It was important to attend to the manner in which queſtions of this ſort have been permitted to paſs upon trials. They are often not attended to, often thought unimportant upon particular trials; and the queſtion put in *Fitz-Harris*'s caſe ſhews it, "whether "the witneſs thought the act with which he was charged "was done with a treaſonable intent?"—which was the very queſtion to be left to the jury. Now that queſtion having been put without any objection to it ſhews, that in the courſe of trials of this nature things are frequently

paſſed

paſſed over, without objection, which ought to be objected to; but, which ſhews that thoſe employed for the crown, do not think that the general neceſſity of public juſtice requires that they ſhould be raiſed. The queſtion here appears to be raiſed ſimply upon grounds of the general neceſſity of public juſtice; but the principles and rules of law, eſpecially the law of evidence in criminal matters, ought to be attended to with a very conſiderable degree of care and caution, or it will be impoſſible to ſay to what length, upon the authority of what has paſſed in particular caſes, the matter may be carried.

He conceived the rule of evidence to be, that a queſtion which went to a particular fact, not relative to the charge of the very fact which was in queſtion, never could in its nature be aſked with a view to try the truth of the particular charge; general character may be given in evidence, general conduct may be given in evidence, conduct being in effect part of character; but in no caſe, where a man is trying for any act, can evidence be given of any particular act done by him at any particular time under ſimilar circumſtances, and the queſtion which is now attempted to be put, appears to be of that nature. If this queſtion can be put, why may not the priſoner give in evidence every letter which he has ever given to any perſon whatever upon political ſubjects, in which he may have ſtated his own objects in any way he thought proper, and perhaps with a view to this very proſecution; if this is conſidered, the danger of the admiſſion of ſuch evidence is conſiderable, and is contrary to all the principles upon which courts have proceeded.

He conſidered the caſes, cited by Mr. *Erſkine*, except as far as inadvertence might have permitted queſtions to paſs unnoticed, not to preſs hard on the preſent caſe.

In lord GEORGE GORDON'S caſe, it did not appear that any one queſtion was put, with reſpect to the words of lord *George Gordon* at any time, which did not, in effect, form part of his conduct in the very tranſaction which was in queſtion. Like the cry of a mob, for inſtance in pulling down a houſe, the general cry of a mob is given in evidence againſt a priſoner, becauſe it was part of the tranſaction at the time. NOTE—*This*

obſervation

obſervation is ſupported by the coalheavers caſe. Leach's Cr. Ca. 2 Edit. 61. 3 Edit. 76.

He then obſerved, that in the other caſes the queſtions were upon the *croſs examination*, not the original examination, which being denied by *Erſkine*, he ſaid he would advert to ſome of them.

Firſt, CORNISH's caſe. What was it? the priſoner called ſeveral witneſſes to teſtify his loyalty, and that he drank the king's health. Does that warrant the queſtion that was going to be put to Mr. *Steuart*, with reſpect to Mr. *Hardy*'s particular object, on a particular thing? for that is the nature of the queſtion that was going to be put.

Second, ſir JOHN FRIEND's caſe. The queſtions there put were evidence of his general conduct, with reſpect to the government of the country; and with reſpect to his views and intentions to that government. The queſtions there put muſt have been on a croſs examination of a perſon who was called to give evidence of a plot. And the fact in ſir *John Friend*'s caſe was, that it was proved he was concerned in a plot. Is the guilt of a perſon with reſpect to a particular fact to be tried, by cauſing perſons to ſay, that at a particular time he ſaid, he would not be concerned in any ſuch plot as was charged? would it be permitted on a trial for murder, to give in evidence that the priſoner ſaid he would not commit a murder? and yet this is the evidence offered. The queſtion muſt have been on croſs examination.

Third, DAMAREE's caſe. It was aſked how the priſoner behaved at any general rejoicings. Is that any thing more than evidence of general deportment? *Ante* .

Fourth, ROSEWELL's caſe. The evidence there, is in a great degree general deportment: though there was a degree of inaccuracy in permitting the queſtion to be put exactly as it was put; but the queſtion tended ſimply to this, whether his general deportment was that of a man loyal and attached to the government of the country, and nothing more. He concluded with ſaying, his object was, to prevent an improper precedent. *Ante* .

Bower,

Bower, on the ſame ſide, urged, that the declarations of parties were evidence only, either in caſes where they accompany the act at the time that they are made, or where they have been at different times, or under different circumſtances, totally unconnected with that fact; which is the queſtion under diſcuſſion in the court, in which caſes they have always been received in the nature of facts, or rather as circumſtances, by which the general conduct of the party is to be judged of; as being circumſtances and being declarations given upon ſubjects to anſwer no particular purpoſe, and not connected with that which is the ſubject matter of diſcuſſion, at the time that the evidence is given.

The caſes cited by *Erſkine*, he inſiſted, confirmed the principle: for, in every caſe he had ſtated, the evidence received had been to ſhew the general conduct and character of the priſoner, in circumſtances and occaſions no way connected with the crime of which he was then accuſed; but as circumſtances and declarations in ſituations from which the jury might collect the general character and conduct of the priſoner.

He allowed that the evidence in caſes of murder, as ſtated by *Gibbs*, was admiſſible, but ſaid that in a caſe of that kind it never was admitted to be ſaid by the priſoner, that he had no intention to kill the deceaſed, and that ſuch aſſertion ſhould be received as evidence to explain the acts which were proved againſt the priſoner, upon the evidence given, and upon which the judgment of the court and jury are to be drawn. He then examined, critically, the ſeveral caſes cited by *Erſkine*, and concluded, with his opinion, that the evidence offered was of a different complexion, and ſuch as he never recollected to have been offered in a court of juſtice.

EYRE, C. B. Nothing is ſo clear, as that all *declarations* which apply to *facts*, and even apply to the particular caſe that is charged, though the *intent* ſhould make a part of that charge, are evidence *againſt* a priſoner, and are *not* evidence *for* him; becauſe the preſumption upon which *declarations* are evidence is, that no man would declare any thing *againſt* himſelf, unleſs it were true; but that every man, if he was in a difficulty, would

make declarations *for* himſelf. Thoſe declarations, if offered as evidence, would be offered therefore upon no ground which intitled them to credit. That is the general rule. *Ante* .

But if the queſtion be, as I really think it is in this caſe, what was the political ſpeculative opinion which the priſoner entertained, touching a reform in parliament? We *all think*, that opinion may very well be learned and diſcovered, by the converſation which he has held at any time, or in any place.

If, as I have ſtated, the declaration was meant to apply to a diſavowal of the particular charge made againſt this man, that declaration could not be received; as for inſtance, if he had ſaid to ſome friend of his, when I planned the convention, I did not mean to uſe this convention to deſtroy the king and his government, but I did mean to get by means of this convention, the duke of *Richmond*'s plan of reform, that would fall within the rule I firſt laid down; that would be a declaration, which being *for* him, he could not be admitted to make, though the law will allow a contrary declaration to have been given in evidence.

Erſkine then put the queſtion to Mr. *Steuart*, the witneſs, thus, "Did you, before the time of the conven-"tion being held, which is imputed to Mr. *Hardy*, ever "hear from him what his objects were? whether he "has at all mixed himſelf in that buſineſs?" which was admitted without objection, and then he was interrogated to *Hardy*'s character, as to ſincerity and truth. Vide *ca. Character. Ante b.* 1. 320. *Hardy's Tr.* 4 *vol. by Gurney, from* 27 *to* 66.

Rule the Fifth.

What a witneſs hath been heard to ſay, at another time may be given in evidence, in order either to invalidate or confirm the teſtimony which he gives in court. 2 *Hawk. P. Cr. ca.* 46.

So determined in the caſe of Lucy Lutteral, widow, execution, &c. *v.* Reynell, Tubbekvill, and Corry. *Trinity*, 29 *Car.* 2. *B. R.*

This

This was an action of treſpaſs, for that the defendants did, with force and arms, take away 4000*l.* of money numbered, &c. On the trial it appeared by the evidence of *William Maynard* that he was guilty, together with the defendants, but was left out of the declaration that he might be a witneſs for the plaintiff.

The Chief BARON ruled that this circumſtance went not to his competency, but to his credit; and to ſupport that, ſeveral witneſſes were received and allowed to prove that he, at ſeveral times did diſcourſe and declare the ſame things and to the ſame purpoſe that he had given in evidence. And the lord chief BARON ſaid, that though *hearſay* was not allowed to be direct evidence, yet it might be made uſe of to this purpoſe, *viz.* to prove that *William Maynard* was conſtant to himſelf, whereby his teſtimony was corroborated. 1 *Mod.* 282. *Bull. N. P.* 294.

The above rule was however ſtrongly conteſted on the trials for high treaſon before commiſſioners of *Oyer and Terminer* in *Ireland*, from the year 1795 to 1798, but the JUDGES conſtantly held that evidence may be admitted to prove the conſiſtency of the teſtimony of a witneſs from the coincidence of facts or accounts given by him at different times of the ſame tranſaction.

As in LEARY's caſe, at a commiſſion of *Oyer and Terminer*, *December*, 1795. 35 *Geo.* 3. at *Dublin*, before CHAMBERLAIN and FENUCANE, Juſtices, and GEORGE, B. The moral character of *James Lawler*, a witneſs for the crown having been impeached on croſs-examination by the counſel for the priſoners, and alſo by witneſſes who ſwore he did not deſerve credit on his oath, giving evidence, in a court of Juſtice. *George Cowan* was called to prove that the witneſs in diſcloſing to him his knowledge of the treaſon charged in the indictment, told him almoſt word for word as he had depoſed in court, on the trial depending, and on the trial of *James Weldon*, previouſly convicted of the ſame treaſon. *Ridgway's Rep. of Leary's Trial*, 88. *alſo M. S.*

In PATRICK FINNY's caſe, at a *Commiſſion of Oyer and Terminer*, *Dublin*, *January*, 1798. 38 *Geo.* 3. before CHAMBERLAIN J. and SMITH, B. the ſame point came

in a ſtronger way before the court than on the preceding trials. *James O'Brien*, the principal witneſs for the crown, and who appeared as a perſon who had procured himſelf to be introduced into a ſociety of United Iriſhmen, for the ſpecial purpoſe of giving evidence, underwent a ſtrict croſs-examination, in which ſeveral queſtions were put tending to ſhake his credit.

Townſhend, of counſel for the crown, immediately, on the cloſing of the croſs-examination, of courſe before any witneſs was produced by the priſoner to impeach the veracity of the witneſs, ſaid, that with the permiſſion of the court he would now examine lord *Portarlington*, and the object of producing his lordſhip was, that as an attempt had been made to impeach the credit of the witneſs, his lordſhip's teſtimony, that information which the witneſs had given to his lordſhip in a converſation of what was going on, was conſiſtent with what he had ſworn on the table.

Curran and *Mac Nally*, for the priſoner, objected to this ſpecies of evidence. They ſaid, if a witneſs be impeached, it is competent to ſet him up and ſhew that the impeachment is not well founded. Every witneſs is impeached in ſome degree by a croſs-examination, but it is not uſual to hear evidence in ſupport of a witneſs for the proſecution until the priſoner's caſe is gone through. If the priſoner's counſel examine witneſſes to general character or to particular facts, then the witneſs for the crown, thus impeached, is intitled to rebut thoſe facts, or call witneſſes to ſupport his general character; but can the counſel for the proſecution ſay, "This man's "evidence is impeached, or ſeems to be impeached by "the counſel for the priſoner, and therefore we think "it neceſſary to ſupport him now. It is not competent "for them to ſet up his character now. 'Tis hooping "the pitcher before it is cracked."

CHAMBERLAIN, J. The tendency of the croſs examination is to impeach the witneſs *O'Brien*, in the particular tranſaction before the court, and the witneſs now offered to be produced is to ſhew, that he gave an account of the proceedings as they happened. It is not competent for them now to produce witneſſes to ſhew

that

that the witneſs already examined is of good character; but they want to prove merely, that his former account is conſiſtent with his preſent. Such evidence has always been received in my experience. Accordingly lord *Portarlington* was ſworn and examined. *Ridgeway's Rep. Finny's trial* 88. *compared with MS. note, by Mac Nally, jun.* *

In the caſe of HENRY and JOHN SHEARS, *at a commiſſion of oyer and terminer, Dublin, July* 1798, 38 *Geo.* 3. before lord CARLTON, C. J. C. P. CROOKSHANK and DAY, J's, and GEORGE and SMITH, B's. Captain *Clibborn* was admitted to prove, that the evidence given in court by *John Wamford Armſtrong*, againſt the priſoners, was conſiſtent with an account of the ſame tranſaction given by him to the witneſs. *Ridgeway's rep. of Shears's trial*, 95, 96. *Alſo MS. note.*

Alſo on the trials of JOHN M'CANN, WILLIAM MICHAEL BYRNE, and OLIVER BOND, at the ſame commiſſion of *oyer and terminer, July* 1798, before the laſt mentioned judges: *William Cope* was called, to prove the conſiſtency of *Thomas Reynolds*, an accomplice, and approver, in converſation with him reſpecting the treaſonable plot of which he had given evidence in court. See *the ſeveral trials reported by Ridgeway.*

Rule the Sixth.

In exception to the general rule, that, "no evidence "can be received againſt a priſoner but in his preſence;" it has been repeatedly determined, and is unqueſtionable law, that on a trial for murder, the declarations of the deceaſed, after the mortal wound is given, conſcious of approaching death, may be received in evidence againſt the priſoner, although ſuch declaration was not made in his preſence.

As in the KING, *v.* REASON and TRANTER, *Hilary*, 8 *Geo.* 1. The priſoners, who were ſheriffs officers, ſtood

* *Finny* was acquitted, and the witneſs, *James O'Brien*, was afterwards hanged for murder.

ſtood charged by indictment, for the murder of *Edward Lutteral*, Eſq. The counſel for the crown offered in evidence ſeveral declarations of the deceaſed, when on his death bed, whereby he charged the priſoners with having murdered him, and the court admitted the evidence. 1 *Strange* 499. 6 *St. Tr.* 195, 201.

In the ſame caſe it appeared, that two juſtices of the peace adminiſtered an oath to the deceaſed on the day of his death, and that he made another, and more particular declaration to the ſame effect, which was taken down in writing by a clergyman preſent; but Mr. *Lutteral* not being able to write, it was not ſigned by him. The COURT called for this paper that had been written from the mouth of the deceaſed, ſaying, that was better evidence than the memory of the witneſs. The original was not to be had; but the clergyman, who gave evidence, tendered a copy, which he ſaid he had taken for his own ſatisfaction, before he delivered the original to the coroner, and offered to ſwear it was a true copy. The counſel for the crown inſiſted that the firſt paper being only the writing of the witneſs, not ſigned by the deceaſed, this which he now produced was as much an original as that. But the COURT refuſed to let it be read, unleſs it was firſt ſhewn that the original was loſt; whereas it appeared, that it could have been procured if ſent for in time. 6 *St. Tr.* 195, 201.

It was then objected by the chief juſtice, that ſince the written evidence was not produced, the whole evidence of the deceaſed's declarations ought to be rejected; for the firſt, ſecond, and third, being all to the ſame effect, are but one fact, of which the beſt evidence was not produced, and therefore no evidence could be received of the firſt and third conference with the deceaſed. But the other judges were of a contrary opinion; ſaying, they were three diſtinct facts, and there was no reaſon to exclude the firſt and third declarations of the deceaſed, merely becauſe no account could be given of the ſecond. And, thereupon the witneſs was directed to repeat his evidence, laying the examination before the juſtice out of the caſe, which he did accordingly. *Ibid.*

So alſo in the KING, *v.* major ONELY, convicted for the murder of *William Gower*, Eſq; *Old-Bailey ſeſſions, March*, 1725, Mr. *Gower's* dying declaration was received in evidence. 9 *St. Tr.* 14, 15.

Rule the Seventh.

Such declaration of a perſon *mortally wounded*, as is ſet forth in the ſixth rule, may be received in evidence on the trial of the offender, although the party wounded did not expreſs any apprehenſion of approaching diſſolution.

As in the KING, *v.* WILLIAM WOODCOCK, *Old-Bailey, January ſeſſions*, 1789, 29 *Geo.* 3. before EYRE, C. B. ASHURST, J. and ADAIR, R. of *London*.

The priſoner was indicted for the murder of *Silvia Woodcock*, his wife, who was found bleeding from ſeveral wounds, and apparently dead. She lived eight hours, repeated the circumſtances of the ill uſage ſhe had received, but never expreſſed any *apprehenſion*, or ſeemed *ſenſible* of her approaching diſſolution. Her depoſition had been taken down in writing, by a magiſtrate, and the queſtion was, whether the evidence which had been obtained from the deceaſed, could legally be left to the jury as a dying declaration.

EYRE, C. B. ſaid, if I were ſatisfied that the caſe was quite full, without the circumſtances which the deceaſed has diſcloſed, I ſhould willingly omit to ſtate them, as evidence againſt the priſoner; becauſe, there is ſome difficulty as to the legality of their admiſſion. Great as a crime of this nature muſt always appear to be, yet the inquiry into it muſt proceed upon the rules of evidence. The moſt common and ordinary ſpecies of legal evidence conſiſts in the depoſitions of witneſſes, taken on oath before the jury, in the face of the court, in the preſence of the priſoner, and received under all the advantages which examination and croſs-examination can give. But beyond this kind of evidence there are two other ſpecies which are admitted by law, and one is the dying declaration of a perſon who has received a fatal blow, the other depoſitions taken before a magiſtrate purſuant to the

the ſtatute of *Phil. & Mary.* Vide, *for the other ſpecies. Ante* 297. *S. C.*

But although we muſt ſtrip this examination of the ſanction to which it would have been intitled, if it had been taken purſuant to the directions of the legiſlature, yet ſtill it is the declaration of the deceaſed, ſigned by herſelf, and it may be claſſed with all thoſe confirmatory declarations which ſhe made after ſhe had received the mortal wounds, and before ſhe died. Now the general rule on which this ſpecies of evidence is admitted, is, that they are *declarations* made in *extremity*, when the party is at the point of death, and when every hope of this world is gone; when every motive to falſehood is ſilent, and the mind is induced by the moſt powerful conſiderations to ſpeak the truth. A ſituation ſo ſolemn and ſo awful, is conſidered by the law as creating an obligation equal to that which is impoſed by a poſitive oath, adminiſtered in a court of juſtice. But a difficulty ariſes with reſpect to theſe declarations; for it has not appeared, and it ſeems impoſſible to find out, whether the deceaſed herſelf apprehended that ſhe was in ſuch a ſtate of mortality as would inevitably oblige her ſoon to anſwer, before her maker, for the truth or falſehood of her aſſertions. Upon the whole of this difficulty my judgment is, that in as much as ſhe was *mortally wounded*, and was in a condition which rendered almoſt immediate death inevitable, as ſhe was thought by every perſon about her to be dying, though it was difficult to get from her particular explanations, as to what ſhe thought of herſelf and her ſituation, her declarations under theſe circumſtances, ought to be conſidered *by a jury*, as being made under the impreſſion of her approaching diſſolution; for reſigned as ſhe appeared to be, ſhe muſt have felt the hand of death, and muſt have conſidered herſelf a dying woman. Declarations ſo made, are certainly intitled to credit; they ought, therefore, to be received in evidence, but the degree of *credit* to which they are intitled, muſt always be a matter for the ſober *conſideration of the jury*, under all the circumſtances of the caſe. His lordſhip then left it with the *jury* to conſider, whether the deceaſed was not in fact under the apprehenſion

apprehenſion of death, though ſhe did not ſeem to expect immediate diſſolution; and ſaid, that if they were of opinion that ſhe was, then her declarations were admiſſible, but that if they were of a contrary opinion, they were not admiſſible. The priſoner was convicted and executed. *Woodcock's caſe, Leach's Cr. Ca.* 2 *ed.* 397. 3 *ed.* 563. *Radburne's caſe, Leach Cr. Ca.* 364. Vide *chap.* 27. *Ante* 282.

So in the KING, *v.* CALLAGHAN, *Cork aſſizes, April* 1793, 33 *Geo.* 3.

The priſoner was indicted for the wilful murder of *Hyde*. Depoſitions of the deceaſed, taken in writing by a magiſtrate, in the hoſpital where he lay, but not in the preſence of the priſoner, were offered in evidence.

Mac Nally, for the priſoner, objected to their being read, on the authority of *Woodcock's* caſe, as not having been taken purſuant to the ſtatute (Iriſh) 10 *Car. c.* 1.

DOWNS, J. ordered the magiſtrate to be ſworn, and he having depoſed, that the deceaſed, at the time of giving thoſe depoſitions, was impreſſed with the fear of immediate death, his parol teſtimony of the facts, declared by the deceaſed, was admitted. *MS.*

The ſame point occurred in DINGLER's caſe, *Old-Bailey, September ſeſſions*, 1791; and GOULD, J. decided as in the laſt caſe. *Leach's Cr. Ca.* 2 *ed.* 300. 3 *ed.* 638. Vide, *Ante* 299. *S. C.*

In Mrs. TRANT's caſe, *Tralee, Kerry, Spring aſſizes*, 1793, 33 *Geo.* 3. The moſt material evidence produced againſt the priſoner, who was indicted for the murder of her huſband, was a declaration made by the deceaſed to a witneſs, after he received a mortal ſtab in the breaſt with a carving knife. On an objection being made,

DOWNS, J. ſaid, the declarations of a perſon who has received a mortal wound, are evidence in almoſt every caſe *to go to a jury*: and are to receive credit from the peculiar circumſtances of the caſe. But while the jury turn ſuch declarations in their mind, they are alſo to take into their contemplation the motive which produced ſuch declarations; and the ſituation in which the party making ſuch declarations conceives himſelf to be at the

time of making them, is alſo a material object for their conſideration. *MS.*

So in the KING, *v.* MICHAEL MINTON, at *Mullingar, Weſtmeath, ſummer aſſizes*, 1800, 40 *Geo.* 3.

The priſoner was tried for a rape and murder of a young woman of ſixteen. The deceaſed lived but a few days after the perpetration of the rape, and communicated a ſhocking detail of circumſtances to her aunt, but did not intimate that ſhe conſidered herſelf in a dying condition, or that ſhe had any apprehenſion of immediate death. It appearing, however, that previous to her making this declaration, ſhe had confeſſed, had been abſolved, and received extreme-unction, from a prieſt, and that theſe are conſidered the laſt rites adminiſtered in the catholic church, and are eſteemed ſacraments by its diſciples,

Lord KILWARDEN, C. J. with the concurrence of KELLY, J. admitted evidence of the declarations of the deceaſed, and left the point of mental impreſſion (as in *Woodcock's*, *Dingler's*, and *Trant's* caſes) to the jury: and the jury found the priſoner guilty. *MS.*

In civil caſes, the rule of receiving, as evidence, the dying declaration of a perſon *in extremis*, hath alſo been adopted; and on the ſame principle as in criminal caſes.

As in WRIGHT, *ex dimiſs* WILLIAM CLYMER, *verſus* LITTLER, *et al'* in ejectment. On the trial of this cauſe, *Mary Victor* was permitted to prove, "That while ſhe "was attending her brother *William Medlicot*, in his laſt "illneſs, and about three weeks before his death, he "pulled out of his boſom the will of 1743, and ſaid, "it was the true will of *John Clymer*, and then deli-"vered it to her, with directions to deliver it over to "*William Clymer*, the leſſor of the plaintiff." And ſhe added, "that one *Edwards* was preſent at the time."

Edwards confirmed the evidence of *Mary Victor*, "That *Medlicot* did pull the will of 1743 out of his "boſom, and gave it to her with ſuch directions as ſhe "depoſed." And on the croſs-examination of *Mary Victor*, ſhe added, "that at the ſame time that *William* "*Medlicot* produced the will of 1743, as the true will "of old *John Clymer*, he *acknowledged* and *declared* to

"him,

"her, that the will or inſtrument of 1745, was forged "by himſelf." And no objection was made to this evidence on the trial.

On a motion for a new trial, the admiſſibility of this evidence was objected to, as being only *hearſay*; that what *Medlicot* ſaid ought not to be admitted or regarded; for it was not ſaid *upon oath*, and there was no opportunity of *croſs-examining* him.

To this it was anſwered, this evidence *is admiſſible*, becauſe it is the *ſolemn declaration of a dying man*, to his neareſt relation, which is equal to an oath: for ſuch declarations of dying men have been admitted as evidence, even in caſes of *murder*. So that it ought not to be called "*mere hearſay evidence*."

Earl MANSFIELD, C. J. on this point obſerved, the defendants complain, that the chief juſtice *(Willes)* miſdirected the jury, by leaving to them as evidence the declaration of *Medlicot*, "that he forged the will." They made no objection to it on the trial, and it certainly was a circumſtance *proper* for the jury to conſider. The competence of evidence depends upon the circumſtances under which it is given. The declaration of *Medlicot*, in his laſt illneſs, when he produced and delivered the will of 1743, for the uſe of the plaintiff, is allowed to be competent and material evidence. As the account was a *confeſſion* of great iniquity, and as he could be under no temptation to ſay it, but to do juſtice and eaſe his conſcience, the evidence was proper to be left to a jury. 3 *Burr.* 1244, 1255.

Rule the Eighth.

The declaration of a convict, at the place of execution, cannot be given in evidence, as the declaration of a dying perſon.

So ruled in the KING, *v.* DRUMMOND, *Old-Bailey, ſeſſions* 1784, 24 *Geo.* 3. before EYRE, C. B. and GOULD, J.

The priſoner was indicted for robbing earl *Clermont*. His counſel informed the court, that one *Edwards*, lately executed for a highway robbery, had communicated ſomething to Mr. *Villette*, the ordinary of Newgate,

touching the commiſſion of the identical robbery under conſideration, and ſubmitted, that as Mr. *Villette*'s knowledge upon the ſubject had proceeded from the ſolemn declaration of a dying man, it was admiſſible evidence in favour of the priſoner.

The COURT held, it would be inconſiſtent with the rules of evidence, which are rules of juſtice, to examine a witneſs to the declarations of a perſon dying under the circumſtances deſcribed. The principle upon which this ſpecies of evidence is received is, that the mind impreſſed with the awful idea of approaching diſſolution, acts under a ſanction equally powerful with that which it is preſumed to feel by a ſolemn appeal to God, upon oath; the *declarations* therefore of a perſon dying under ſuch circumſtances, are conſidered as equivalent to the *evidence* of the living witneſs upon oath. But to examine a witneſs to the declarations of an attainted convict, would be carrying the rule of evidence beyond its poſſible extent, even if the perſon were alive; for as an attainted convict, he could not have been permitted to give teſtimony upon oath, and the dying declarations of ſuch a perſon cannot, conſiſtently with the principles of juſtice, be conſidered as better evidence than his teſtimony upon oath would have been were he alive.

The fact, however, that a man reſembling the perſon of the priſoner was executed, may be given in evidence, provided it is confined within ſuch time as to make it probable that he was the perſon who committed this robbery. *Leach's Cr. Ca.* 2 *ed.* 275, 276. 3 *ed.* 378.

From the reaſon aſſigned for rejecting the evidence of a convict in the foregoing caſe, it appears, that the dying declaration of a perſon *attainted*, cannot be received, even on an indictment for the murder of ſuch perſon, for his competency is totally deſtroyed, unleſs reſtored by pardon.

Rule the Ninth.

Every witneſs, whether on his examination in chief, or on the croſs-examination, has a natural right to explain and make clear the evidence he has given; and if

any *doubt* ariſes after his examination has cloſed, the court will call upon him for ſuch explanation.

Such explanation is, in many inſtances, allowed in written evidence, and it is much more reaſonable that it ſhould be admitted on examinations *viva voce*. Counſel are apt, on croſs-examining a witneſs, to impeach his credit, on apparently contradictory matter: and lord MANSFIELD has often ſaid, on ſuch occaſions, "Would "you have the witneſs perjured, becauſe he will not be "perjured, but corrects himſelf like an honeſt man?"

The good ſenſe of this rule, and of lord MANSFIELD's obſervation, appears in the following caſe.

The KING, *v.* HUNY, *Thetford aſſizes, March* 1786. The indictment, which was for *perjury*, charged the defendant with having "Falſely, corruptly, wilfully, and "maliciouſly depoſed, that *John Watſon* was indebted "to him the ſaid *William Huny*, in the ſum of eleven "ſhillings, whereas in truth and in fact, the ſaid *John* "*Watſon* was not indebted to him the ſaid *William* "*Huny*, in the aforeſaid ſum, nor in any other ſum of "money whatever."

The caſe ſtated was, that captain *Shipley*, of the ſhip *Alexander* and *Margaret*, applied to the court of admiralty, of the borough of *Great-Yarmouth*, to recover anchors and cables, which his ſhip by ſtreſs of weather, was obliged to leave in *Yarmouth-road*, on paying the charge of ſalvage. *Huny*, as agent to captain *Shipley*, paid the bill, but having made an objection to the charge of cartage, ſummoned Mr. *Watſon* before the court of requeſts, to anſwer for an over-charge. Mr. *Watſon*, an attorney, was judge of the court of admiralty, and Mr. *Reynolds*, his partner, preſided in the court of requeſts. The clerk of the court adminiſtered the oath to Mr. *Huny*, according to the practice, in order to his proving the demand, and then aſked him, *is Mr. John Watſon, indebted to you Mr. Huny in the ſum of eleven ſhillings?* the ſum demanded: he anſwered *he is*. On the queſtion being repeated, and the witneſs deſired to recollect himſelf, he ſubjoined, *as agent to Mr. Shipley*.

Sir GEORGE NARES, J. on the evidence for the proſecution being cloſed, ſaid, "It would be hard indeed, if

"a man

"a man were not ſuffered to explain his own mean-
"ing; here is evidently an indictment found on part of
"an oath, when that which is moſt eſſential to its
"meaning is left out." The counſel on the other ſide would have the cauſe go on; but the judge ſaid it could not; and that he hoped future proſecutors would take care from ſuch an example, not to prefer indictments on ſuch unjuſt grounds. And turning to the jury, repeated, that this was perjury aſſigned on *part* only of an oath, the moſt material part being purpoſely kept back. That of courſe they muſt find a verdict of *not guilty*; and the jury acquitted the priſoner, warmly expreſſing their feeling.

After, on an action for a malicious proſecution, a ſpecial jury gave 3000*l.* damages. *Gilb. Law of Evid. by Loft*, 55.

Rule the Tenth.

What has been ſworn againſt a defendant on the trial of another perſon ought not to be given in evidence againſt him on his own trial. 2 *St. Tr.* 863.

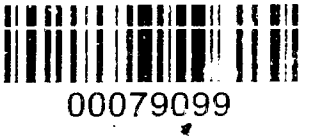
Yet, in the caſe of ſir JOHN FENWICK, impeached by the Commons of England, 8 *Will.* 3. it was moved that evidence ſhould be admitted to prove what a perſon named *Goodman* had ſworn againſt a perſon named *Cook*, who had been tried for treaſon.

Sir T. Powis and Sir Bart. Shower, for the priſoner, urged, what is ſworn againſt one man at one time muſt be always taken for truth againſt *all* others. The trial of one of a company is the trial and condemnation of all; contrary to a fundamental rule of law that no evidence ſhall be given againſt a man when he is upon the trial of his life, but in his preſence: becauſe the offences may be different, and becauſe the priſoner may croſs-examine him who gives ſuch evidence; and that is due to every man in common juſtice. 5 *St. Tr.* 83.

Sir CHRISTOPHER MUSGRAVE, a member, aſked of the houſe, is there any law in being that ſays a judge may hear a witneſs as to what was ſworn upon the trial of another perſon, to condemn him who was not party to

that trial? If there be no ſuch law, then the rule is founded upon juſtice and common right, that nothing ſhall be brought againſt a man, when a man was not party, when the oath was not made, and he had no opportunity to examine the witneſs. *ib.* 118.

After a very long, ardent, and intereſting debate, the motion was carried in the *affirmative* againſt the eſtabliſhed rule and known principles of law, on the ground that though ſuch evidence could *not* be received in the courts of law, yet it was admiſſible before the Commons on an impeachment, for that they were not bound by the rules of evidence adhered to in Weſtminſter-hall. *ibid.* *Ante ca.* 18. *p.* 282.


00079099

V
(AVP)

Digitized with financial assistance from
Mr.Aneesh Vasant Pradhan
on 21 February, 2019